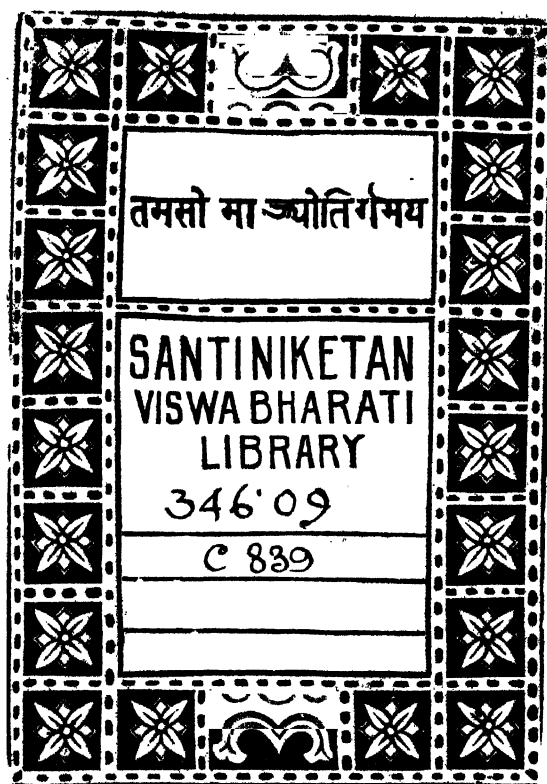

तमसो मा ज्योतिर्गमय
SANTINIKETAN
VISWA BHARATI
LIBRARY
346.09
C 839

History and Constitution
OF THE
Courts and Legislative Authorities in India

History and Constitution
OF THE
Courts and Legislative Authorities in India

BY

HERBERT COWELL, Bar.-at-law,
Tagore Law Professor, 1870—1872.

SIXTH EDITION, REVISED BY

S. C. BAGCHI, LL.D., Bar.-at-law,
Principal, University Law College, Calcutta ; Tagore Law Professor, Calcutta University (1914).

CALCUTTA
THACKER, SPINK & CO. (1933), LTD.
1936.

PUBLISHED IN MAY MCMXXXVI
BY THACKER, SPINK & CO. (1933),
LIMITED
PRINTED IN CALCUTTA BY
THACKER'S PRESS AND DIRECTORIES,
LIMITED

PREFACE

"The student of Constitutional Law realises at every turn the truth of the saying—the roots of the present lie deep in the past". Professor Cowell had fully anticipated the value of this observation, since made classical by Sir William Anson, when he delivered his Tagore Law Lectures on the History and Constitution of the Courts and Legislative Authorities in India. The "lectures" in successive editions have formed a reliable handbook for every person interested in the history and growth of the Indian institutions concerned. But there have been many changes in the law affecting them, and the Indian Legislatures, in particular, have been re-cast, re-constituted and progressively expanded in a succession of Reforms Acts passed since the Fifth Edition of the book was published. So at the invitation of the publishers I have prepared this new edition of what may be regarded as the standard treatise on the subject. The additions and alterations found necessary have been made so as not to interfere in any way with the framework and scheme of the original book. The early history of the Privy Council has had, however, to be re-written in the light of the results of recent research, and a new

chapter has been added embodying the substance, trend and purposes of recent enactments affecting the constitution of British India in its various aspects, so that the present book gives a full explanatory account of the Institutions in question as they stand at the date of publication.

In the work of revision I have derived substantial help from one of my former colleagues at the University Law College, Professor N. N. Ghose, sometime Tagore Law Professor, Professor and Dean of the Faculty of Law (1926—1934) at the Dacca University, and author of the standard book on *Comparative Administrative Law*. He has written out the entire chapter on the recent reforms and his expert knowledge, which he laid unreservedly at my disposal in this work of revision, has added considerably to the value of this new edition.

S. C. B.

TABLE OF CONTENTS.

CHAPTER III.

EARLY HISTORY: THE SETTLEMENT OF 1781.

CHAPTER IV.

THE LEGISLATIVE COUNCILS.

PAGE

CHAPTER V.

THE LEGISLATIVE COUNCILS—(*Continued*).

CHAPTER VI.

HISTORY OF THE REFORMS OF 1909, 1919 AND 1935.

CHAPTER VII.

Later History: the Presidency Town System.

CHAPTER VIII.

Later History: the Provincial Civil Courts.

PAGE

CHAPTER X.

THE PRIVY COUNCIL.

CHAPTER XI.

THE SUPERIOR COURTS.

CHAPTER XII.

THE INFERIOR CIVIL COURTS.

CHAPTER XIII.

THE INFERIOR CRIMINAL COURTS AND POLICE.

TABLE OF CASES.

CHAPTER I.

EARLY HISTORY: THE GRANT OF THE DEWANNY.

Introduction—Commencement of established Institutions—Character of antecedent history—First introduction of Europeans into India—Early history of the East India Company—Territorial acquisitions—Fall of the Mogul Empire—Aggressive policy of the Company—Settlement in Bengal—Position of the English before their Conquest—Legislative Authority of the Company during that period—Charter of Elizabeth—Of James I—Of Charles II—Of William III—Charters of 1726 and 1753—Judicial Authority of the Company during that period—Necessity for obtaining it—Early Charters—Mayors' Courts—Jurisdiction of the Governor and Council—Mayors' Courts and Courts of Requests—Subjugation of Bengal—Civil Disorders and Anarchy—Elements of Civil Order—Relations of the Mogul, the Nabob, the Crown and the Company—First Attempt to re-organize Society—Grant of the Dewanny—Its effect—No Judicial Coercion over Europeans—Reforms of Lord Clive—Necessity for Grant of Definite Authority.

Introduction.

THE purpose of the work is to present a general view of the legislative power and judicial authority now and heretofore exercised in British India. And in doing so it will be unnecessary to refer with the accustomed detail to the various enactments passed during the rule of the Company in reference to this subject. The earlier legislation is treated at length in Harrington's Analysis, which was published in 1805; and a long string of Acts and Regulations is to be found in Auber's Analysis, Morley's Digest, and other works. The object of this volume is to separate the existing legislative and judicial institutions from the previous history of those institutions, reducing the latter as much as possible to a continuous narrative. The subject is preliminary to the study of the laws in force in British India, and deals with the character

CHAPTER I.

and powers of the councils and tribunals which respectively make and administer those laws. In any question of difficulty as to the source and early boundaries of power in reference to any institution, the particular enactments relating to it must always be consulted. So far as regards the legislation of the past, its general character and historical bearing will here alone be explained; that which regulates existing institutions will be treated in greater detail.

The suppression of the Indian Mutinies and the assumption of the government in name as well as in reality by the English Crown in 1858 led to a consolidation and re-establishment of the Indian Empire; and the year 1861, in which the Indian Councils' Act and the Indian High Courts' Act were passed, marks the close of a tedious and intricate period of Indian constitutional history. From 1861 to 1919, the date of the Montagu-Chelmsford Government of India Act, that history will be seen to have developed along lines of which the foundations were those laid in 1858 and 1861. Fundamental changes were initiated in the constitution and functions of the legislative authorities, and partly also in the structure and working of the executive government, by the Government of India Act of 1919, in order to give effect to the intention of the British Parliament and Government to confer a measure of responsible government in the Provincial administrations in India, by way of experiment more or less. The Government of India Act of 1935, recently enacted, contemplates an even more radical departure from the ideas that underlay the Reforms of 1858—1861. The coming years may be expected to see the establishment of the beginnings of an All-India Federation with self-governing British Indian Provinces and self-acting Indian States for

units, and the institution, as a necessary corollary thereto, of an All-India Federal Court.

1600—1765.

Constitutional history in India has had nothing to do with the steady spontaneous growth of national institutions. It is a record of experiments made by foreign rulers to govern alien races in a strange land, to adapt European institutions to Oriental habits of life, making definite laws supreme amongst peoples who had been accustomed to associate government with the exercise of arbitrary and uncontrolled authority. There is considerable vacillation of purpose exhibited in those experiments, influenced as they have been by conflicts of opinion and the rivalry of interests, but on the whole there has been a steady advance towards higher conditions of progress.

Commencement of established institutions.

The year 1781 marks a most important era in the history now under consideration. It terminated a period of fierce animosity and struggle between those who wished to see English law and Courts of Justice introduced at once into the country and rendered supreme over the Executive, and those who considered that such a policy was wholly impracticable, and that, circumstanced as the English then were, Government must for a long time to come control the authority of the Courts. It commenced the era of independent Indian legislation; of the authority of the Supreme Court, as it continued more or less to be exercised for eighty years; of the establishment of a Board of Revenue "entrusted with the charge and administration of all the public revenues of the provinces, and invested in the fullest manner with all powers and authority, under the control of the Governor-General and Council"; * of the recognition by Act of Parliament

* 2 Harrington's Analysis, p. 35.

CHAPTER I.

of the established Sudder and Provincial Courts; and of the recognition by Act of Parliament and in the Revised Code of Bengal of the right of Hindus and Mahomedans to be governed by their own laws and usages. The plan of government, both as regards legislation and the Courts of Justice, in that year assumed a definite shape, and although many changes of course ensued in the long period (1781—1861) which separated the administration of Warren Hastings, the first Governor-General of India, from the close of that of Lord Canning, its first Viceroy, still they were changes of detail, often of great importance, but leaving unaltered the general character of the system then introduced.

The year 1781 may therefore well be taken as the first dividing point of time at which the character of that history essentially changes, at which the boundaries of authority have at last become strongly defined.

Character of antecedent history.

Previous to that date the general character of Indian history, or of the history of the government by the English of their Indian possessions, is seen to have been one of military struggle and civil tumult interspersed with occasional efforts to organize society. A vivid description of it is given by Lord Macaulay in his celebrated Essays on Lord Clive and Warren Hastings. The chief centres of interest are the individual efforts and achievements of the two powerful chiefs who laid the foundation of the British Empire in India, and to whom the natives of India owe a juster government, greater security, greater wealth, and means of social happiness and order than they ever experienced before or would ever have been likely to obtain had Clive and Hastings never lived.

Previous to that date, moreover, the history of Courts and Legislatures was intermixed with the

history of the Executive, and they must be pursued together. For notwithstanding the well-meant attempt, in 1773, by means of the Supreme Court then established to introduce law and order, the rash and ignorant though well-intentioned policy, of which that scheme betrays the existence, only increased the civil confusion, and in the midst of the greatest disorder almost paralysed the authority of government, without substituting any other means of security for life and property. It will be convenient, therefore, to divide the history of this subject into two portions; to give a general view of the Company, its conquests and its efforts at social organization with reference to surrounding circumstances down to 1781, and afterwards to trace the subsequent history of the legislative and judicial institutions, which by that time had sprung into separate and definite existence. 1600—1765.

The first branch of the subject is worthy of considerable attention. It includes within its scope the two most important events of the grant of the Dewanny by the Mogul Emperor, and the Parliamentary attempt to settle Indian affairs by the Regulating Act. Those occurrences refer exclusively to Bengal. The other Presidencies were governed in imitation of the policy pursued by the Supreme Government in reference to the chief Presidency. The problems of difficulty were worked out in Bengal and their solution was transferred to Madras and Bombay.

First introduction of Europeans into India.

To start from the beginning, the Portuguese were the first European nation who persevered in carrying on trade and acquiring dominion in India. Their countryman Vasco da Gama had discovered the passage round the Cape of Good Hope, and thus for a whole century conferred upon the nation to which he belonged a monopoly of trade and commerce in the East.

CHAPTER I.

Subsequently the Dutch followed the Portuguese, and subverted their power. Finally English merchants endeavoured to prosecute trade with India, and their efforts proving successful, a Charter was granted by Queen Elizabeth in the year 1600, incorporating the London East India Company, and giving to them the exclusive right of trading to all parts of Asia, Africa, and America beyond the Cape of Good Hope, eastward to the Straits of Magellan.

Early history of the East India Company.

With regard to the existence of the Company, it seems that after the restoration of Charles II various attacks were made upon the existence and enjoyment of exclusive rights which had been conferred by the Crown irrespective of Parliament; but they were made without effect. In 1698,* however, another Company was incorporated under authority of an Act of Parliament by a separate Charter under the name of the English East India Company. Ten years afterwards the two Companies were united under the award of Lord Godolphin in the sixth year of Queen Anne: the Charter granted by William III in 1698 remaining as the foundation of the privileges of the united Company, under which the Court of Directors was constituted and the General Court of Proprietors was vested with the chief authority and control over the affairs of the Company. This constitution remained unchanged till the Regulating Act of 1773, under the provisions of which statute a Governor-General and Council were first nominated, with power over the whole of the Company's possessions in India, a Board of Control being shortly afterwards formed at Home.

During the sixty-five years which elapsed from the union of the two Companies under the award of

---

* See 9 & 10 William & Mary, Chap. 44.

Lord Godolphin down to the Regulating Act of 1773, great acquisitions of territory were made; and the position of the Company was gradually changed from that of tenants of factories, owing obedience to the Mogul Emperor, to one of practical and independent sovereignty. 1600—1765.

Territorial acquisitions.

With regard to acquisitions of territory, the first possession of the English was the island of Bombay, ceded to Charles II in 1661 by the King of Portugal as part of the marriage dowry of the Infanta. Charles II granted it to the East India Company, which about the same time gained possession of some factories on the west coast of India. Somewhat later, factories were established at Madras and other places on the east coast. Last of all, the Company made trading settlements in Bengal, and founded Calcutta. The factories of Bombay, Madras, and Calcutta became the leading factories in their different localities, and exercised control and supervision over the subordinate depôts and places in their vicinity.

Fall of the Mogul Empire.

The ruin of the Mogul Empire proceeded with great rapidity after the death of Aurungzeb in 1707. He was succeeded by a series of nominal sovereigns, whose dominions were invaded and whose authority was defied. The Mahrattas overran the country, which they either subjected to their rule or wasted by their plunder. Even the European factories were in danger, and the settlement of Calcutta was fortified and enclosed within the Mahratta ditch. It was during this feud between the Mahratta and the Mahomedan, which spread from one end of the empire to the other and threw the whole peninsula into confusion, that the French and English first began the work of conquest and annexation. The conquests of the French, the principal of which was in the Madras

CHAPTER I.

Presidency, were first disputed by Clive in the year 1750, and from that time the power of the English continued steadily to increase, and that of the French to decline. In a very few years the English occupation of Madras was placed beyond the reach of French aggression; the vigour and force which the long rivalry had developed serving for the time to secure to the Presidency of Madras the leading rank in the Company's settlements.

Aggressive policy of the Company.

Thus Madras became the most important possession of the Company. It was the scene of the early victories of Lord Clive, and of the first successful efforts to acquire political power and dominion over the country. It was not, however, till the middle of the 18th century that the Company began to combine military and political aims with the ordinary pursuits of a mercantile corporation. Its rivalry with the French, the neighbourhood of the Mahrattas, and the frequent attacks to which it was in consequence exposed speedily converted its Madras servants into soldiers, and paved the way to occasional conquests. Eventually the decay of the Mahomedan power in India, the incursions of the Mahrattas, and the rivalry of the French rendered it necessary for the Company to choose between immediate withdrawal and a policy of aggression.

Settlement in Bengal.

Up to this time, although the English had built Fort William and settled in Bengal, they had not departed from the character of merchants and factors. The accession of Surajah Dowlah in 1756, who entered upon a policy of repression which he had not the resources to sustain, was the commencement of a series of struggles which ended in the establishment of the Company's authority in the Lower and afterwards in the Upper Provinces of Bengal. The capture of Fort William and the tragedy of the Black Hole roused

the vengeance of the settlement at Madras. Clive came to Bengal, recovered Calcutta and in the next year (1757), by the battle of Plassey, destroyed the power of Surajah Dowlah, and obtained possession of Moorshedabad, with authority over the whole of Bengal. 1600—1765.

Position of the English before their conquest.

The foregoing observations will serve as a sketch of the origin and progress of the Company and its conquests down to and shortly after the battle of Plassey. During this period wherever the English settled, except in the island of Bombay. which had been ceded in full sovereignty to Charles II. the general character of their position was that it was obtained by leave of the Native Government. In Bengal especially their settlements were founded and their factories fortified with that leave, in districts purchased from the owners of the soil by permission of that Government, and held under it by the Company as subjects owing obedience, as tenants rendering rent, and even as officers exercising by delegation a part of the authority of the Native Government.*

The ordinary consequences of this state of things would have been to render the English subject to the Native Government and amenable to its laws. They could not, however, be governed by the law of the Koran, and therefore from necessity they remained subject to their own law, and were obliged to take measures for introducing and administering it. Before the English assumed sovereign powers and independence of native authority, their position was extremely anomalous. Though their factories were part of the dominion of the Mogul, their own law was administered

* See judgment of Lord Brougham in the *Mayor of Lyons* v. *East India Company*, 1 Moore's Indian Appeals, p. 272.

Chapter I.

on them, and their own national character imparted to them as completely as if they were parts of English territory. A foreigner residing in them and carrying on trade was held to take his temporary national character not from the Mogul dominion, to which they were subject, but from the British possessions.*

Legislative authority of the Company during that period.

Under these circumstances, it became necessary in very early days of the existence of the Company that the Crown should grant to them certain legislative and judicial authority to be exercised in their East Indian possessions. That authority, however, it seems clear, was only intended to be exercised over their English servants and such native settlers as placed themselves under their protection. With regard to the early legislative authority, the Charter of Queen Elizabeth in 1601 granted to the Governor and Company or the more part of them (being assembled) power, long before they possessed any territory or sovereign authority, " to make, ordain, and constitute such and so many reasonable laws, constitutions, orders, and ordinances, as to them or the greater part of them being then and there present, shall seem necessary and convenient for the good government of the said Company and of all factors, masters, mariners, and other officers employed or to be employed in any of their voyages, and for the better advancement and continuance of their trade and traffic ". They were also empowered to put in use and execute such laws, " and at their pleasure to revoke and alter the same or any of them as occasion shall require ", and to provide such pains and penalties by imprisonment or fine as might seem to them necessary to secure their due observance.

Charter of Elizabeth.

* See the *Indian Chief*, per Lord Stowell. 3 Rob. Adm. Rep., 12 at p. 29.

James I by his Charter, granted in 1609, renewed the same power, both Charters containing the proviso "so always as the said laws, orders, constitutions, ordinances, imprisonments, fines, and amerciaments be reasonable and not contrary or repugnant to the laws, statutes, or customs of this our realm". 1600—1765. of James I.

Charles II's Charter, granted in 1661, contained a similar provision. of Charles II.

In the Charter relating to the island of Bombay, of which the sovereignty had been ceded, granted by Charles II in the year 1669, a similar power of legislation was given.

All these early Charters were surrendered when the two Companies were amalgamated under the award of Lord Godolphin. The laws passed in pursuance of them were directed to be published; but no trace of them now exists. They probably were for the most part concerned with the trade of the Company, preserving its monopoly and repressing interference It is probable that the powers were not extensively used but it was necessary that they should exist, in order to provide for any emergency that might arise.

The Charter granted by William III in 1698 became the foundation of the United Company, which was subsequently called the East India Company.* By it, the Company were vested with the government of all their forts, factories, and plantations, the sovereign power being reserved for the Crown. Courts of Judicature were also established as before, but nothing was then said about a power of legislation. of William III.

In George I's Charter of 1726, which also established the Mayors' Courts, the Governors and Councils Charters of 1726 and 1753.

* *Vide* 3 & 4 Wm. IV, Chap. 85, Section 111.

CHAPTER I.

of the three Presidencies were vested with the power "to make, constitute, and ordain bye-laws, rules, and ordinances for the good government and regulation of the several corporations hereby created, and of the inhabitants of the several towns, places, and factories aforesaid respectively, and to impose reasonable pains and penalties upon all persons offending against the same or any of them". Such laws and penalties were to be agreeable to reason, and not contrary to the laws and statutes of England. They were not to have any force or effect until the same had been approved and confirmed by order in writing of the Court of Directors. And then the Charter proceeded: "We do hereby ordain and declare that none of the corporations hereby created shall have a power or authority to make any bye-laws, rules, or ordinances whatsoever other than such rules as they are respectively by these presents empowered to make". The Charter of 1753 gave a similar power, omitting the passage quoted.

Judicial authority of the Company during that period.

With regard to the grant of judicial authority to be exercised in the Company's settlements, we might reasonably expect that it would be called for and required before the necessity arose for establishing any legislative authority. The actual decision of disputes in an infant society is of practical importance long before the necessity of a definite body of rules is felt. Moreover, the English were supposed to bring with them such of their own laws as were applicable to them in the circumstances in which they were placed. And factories established amongst races alien in religion, habits and customs have always been deemed by the law of nations which has prevailed in Christendom to be so far exclusive possessions, or at least privileged places, that all persons during their residence within them have been considered for most

purposes to be clothed with the national character of the State to which the factory has belonged. 1600—1765.

Necessity for obtaining it.

Accordingly it seems that as early as 1618, Sir Thomas Roe, the Ambassador of James I, had secured by treaty with the Mogul the privilege, for the factory at Surat, that disputes between the English only should be decided by themselves. The East India Company, before the end of the 17th century, had obtained and made use of permission to build fortifications at Madras and Calcutta, and thus established and defended their own authority within their own factories. Under these fortifications, Natives built houses as well as Europeans. And when the Nawab * on that account was about to send a Kaji, or Judge, to administer justice to the Natives, the Company's servants bribed him to abstain from this proceeding. At the same time they held the island of Bombay under a grant in perpetuity from the Crown of England. It was absolutely essential, therefore, in very early days that some authority to administer justice and some regularly constituted judicial authorities should exist in the possessions of the Company.

Early Charters.

In the earliest Charters granted by the Crown, power was given to the Company in a general and indistinct way to administer justice to those who should live under them. In 1661 Charles II gave by Royal Charter to the Governor and Council of the several places belonging to the Company in the East Indies power "to judge all persons belonging to the said Governor and Company or that should live under them in all causes, whether civil or criminal, according to the laws of the kingdom, and to execute justice

* See judgment of Lord Brougham in *Mayor of Lyons* v. *East India Company,* 1 Moore's Indian Appeals, p. 272.

CHAPTER I.

accordingly". In grants to the Company within the next thirteen years of the islands of Bombay and St. Helena, full power was given for the exercise by the Company of judicial authority according to the British laws. And in 1683 Charles II granted a further Charter in which the royal will was declared that a Court of Judicature should be established at such places as the Company might appoint; to consist of one person learned in the Civil laws and two merchants all to be appointed by the Company, and to decide according to equity and good conscience and according to the laws and customs of merchants by such rules as the Crown should from time to time direct either by the Great Seal or Privy Seal; failing which directions by such ways and means as the Judges should think best. These provisions were continued in some subsequent Charters, but they do not appear to have been effectual for the purpose for which they were framed.

Mayors' Courts.

In less than twenty years after the United Company was established under the Act of Queen Anne, its Court and Directors represented by petition to George I that there was great want at Madras, Fort William, and Bombay of a proper and competent power and authority for the more speedy and effectual administering of justice in civil causes, and for trying and punishing of capital and other criminal offences and misdemeanours; and they accordingly prayed permission to establish Mayors' Courts at these places. Thereupon the existing Courts, whatever they may have been, were superseded, and in the year 1726 (13th Geo. I) the Crown by Letters Patent established Mayors' Courts at Madras, Bombay, and Fort William, each consisting of a Mayor and nine Aldermen, seven of whom with the Mayor were required to be natural born British subjects. They were declared to be Courts of

Record, and were empowered to try, hear, and determine all civil suits, actions, and pleas between party and party. 1600—1765.

Jurisdiction of the Governor and Council.

By virtue of the same Letters Patent each Local Government consisting of a Governor and Council was constituted a Government Court of Record to which appeals from the decision of the Mayor's Court might be made. In causes involving sums under 1,000 pagodas,* the decision of the Government Court was final; if the sum involved was above that amount an appeal lay from the Government Court to the King in Council. The Government Court was further constituted a Court of Oyer and Terminer, and was authorized and required to hold Quarter sessions for the trial of all offences excepting high treason. The Mayors' Courts were empowered to grant probates of wills and administration to the effects of intestates.

The Charter of George I recited that the Company "had by a strict and equal distribution of justice very much encouraged not only our own subjects, but likewise the subjects of other princes and the natives of adjacent countries to resort to and settle in the said forts, towns, factories, and places, by which means some of them had become very populous, especially the places called Madras, Bombay, and Fort William in Bengal". It also recited that "there was great want in all the said places and in other settlements of the Company of a proper and competent power and authority for the more speedy and effectual administering of justice in civil causes and for the trying and punishing of capital and other criminal offences and misdemeanours". The criminal trials were directed to

---

* A pagoda is a Madras coin, never current in Bengal, of the value of about eight shillings of English money.

CHAPTER I.

be conducted "in the same or the like manner and form as near as the conditions and circumstances of the place and inhabitants will admit of as any our Justices of the Peace or Commissioners of Oyer and Terminer and Gaol Delivery do or may proceed by virtue of any commission by us granted for that purpose".

Mayors' Courts and Courts of Requests.

This Charter was superseded by the Charter granted to the same Company in 1753 (26 Geo. II), which re-established Mayors' Courts at Madras, Bombay, and Calcutta, with some amendments intended to remedy defects of which the Company had complained. The new Letters Patent also established a Court of Requests at each of the said places for the determination of suits "where the debt duty or matter in dispute should not exceed five pagodas". Both Courts were made subject to a control on the part of the Court of Directors, who were authorised by the Letters Patent to make "bye-laws, rules, and ordinances for the good government and regulation of the several Courts of Judicature established in India". The chief alteration effected by the new Letters Patent was that the Courts which they established were limited in their civil jurisdiction to suits between persons who were not Natives of the several towns to which the jurisdiction applied. Suits between Natives were directed not to be entertained by the Mayors' Courts unless by consent of the parties.

These Letters continued in force in Bengal for about twenty years, and in Madras and Bombay for a longer period. A Committee of Secrecy, appointed to enquire into the state of the East India Company, observed with reference to the Mayors' Courts that the Judges were justly sensible of their own deficiency and had frequently applied to the Court of Directors for assistance. Application was thereupon made to the Crown for a new Charter of Justice for Bengal.

1600—1765.

Thus the first Courts of Record established in Bengal existed for nearly fifty years. It does not ppear whether, in the original Letters Patent or in hose which with some alterations were substituted for them in 1753, there was any intention on the part of the Crown to assert any territorial dominion. In the Charter of 1753, although there was no precedent for it in the Charter of 1726, civil suits between Natives were expressly excepted from the jurisdiction of the Mayors' Courts, and directed to be determined among themselves; which appears to involve a renunciation of sovereign authority at that time over Natives.

Subjugation of Bengal.

This, then, was the extent of legislative and judicial authority possessed by the Company at the time when the events which succeeded the battle of Plassey (A.D. 1757) compelled them to undertake the task of reconstituting and reorganizing society in the Lower Provinces of Bengal, i.e., to assume all the functions of sovereignty. A period of greater political confusion than that which followed the subjugation of those provinces it is impossible to imagine. The conquered were without spirit or means of defence; the conquerors exhibited all that ravening for plunder which sudden and easy acquisition of wealth inspires, possessed scarcely any of the elements of social union themselves, and were both unwilling and unable to undertake the duties of government. The position was pregnant with all the evils which the Normans introduced amongst the conquered Saxons in England, evils of rapine, plunder, and tyranny, without the redeeming accompaniments of the strong government and determined spirit of order which belonged to the Norman conquerors, who were the most civilized people of early Europe, and the most advanced in the arts of government and in political organization. The victors of Bengal were for the

CHAPTER I.

most part anxious to plunder, and then withdraw from a climate which they regarded as fatal; they were separated by a year's journey from the government to which they owed allegiance, and were as a general rule incapable, from their habits and knowledge and previous pursuits, of conceiving higher aspirations or duties than those of augmenting the dividends of their Company.

Civil disorders and anarchy.

Shortly after the subjugation of Bengal, Clive departed to England, and during the five years which followed, the misgovernment of the English, says Lord Macaulay, was carried to a point such as seems hardly compatible with the very existence of society. They pulled down one prince and set up another in his turn, and on each accession to the throne, the new monarch divided among his foreign masters the treasures of his predecessor. The position of the Natives under these circumstances is vigorously described by Lord Macaulay:—"The servants of the Company obtained not for their employers, but for themselves a monopoly of almost the whole internal trade.* They forced the Natives to buy dear and to sell cheap. They insulted with impunity the tribunals, the police and the fiscal authorities of the country. They covered with their protection a set of Native dependents who ranged through the provinces spreading desolation and terror wherever they appeared. Every servant of a British factor was armed with all the power of his master; and his master was armed with all the power of the Company. Enormous fortunes were thus rapidly accumulated at Calcutta, while thirty millions of human beings were reduced to the extremity of wretchedness. They had been accustomed to live under tyranny, but never under tyranny like this.

* Macaulay's Essays, Vol. III, p. 177.

They found the little finger of the Company thicker than the loins of Surajah Dowlah. Under their old masters they had at least one resource: when the evil became insupportable, the people rose and pulled down the government. But the English government was not to be so shaken off. That government, oppressive as the most oppressive form of barbarian despotism, was strong with all the strength of civilization. It resembled the government of evil genii rather than the government of human tyrants. * * The unhappy race never attempted resistance. Sometimes they submitted in patient misery, sometimes they fled from the white man as their fathers had been used to fly from the Mahratta; and the palanquin of the English traveller was often carried through silent villages and towns which the report of his approach had made desolate". 1600—1765.

Elements of civil order.

The position was shortly this. The servants of a mercantile company, with some judicial and legislative authority existing amongst them wholly inadequate even to their own requirements, with all bands of discipline totally relaxed, were the military masters of the country, practically freed from all control from England. Sovereignty and the right of administering civil and criminal justice were vested in the Mogul Emperor, whose government of the provinces of Bengal consisted* of two parts: the Dewanny or collection of the revenues and the administration of the principal branches of the department of civil justice, and the Nizamut or the military branch of the government, with the superintendence of the criminal department of judicature: and of these the Dewanny was subordinate to the Nizamut.

* Mill's History of India, Vol. IV, p. 19.

CHAPTER I.

Relations of the Mogul, the Nabob, the Crown and the Company.

The powers and duties of the native government had long been delegated to the Nabob of Moorshedabad, but the victories of the English had finally dislodged his authority. Those victories in reality transferred the rights of sovereignty to the English Crown; but the seat of that government was in London, and it was practically impossible for the Crown to exercise its rights. The Company, on the other hand, were by no means desirous of invoking the aid of the Government at Home; they regarded any step in that direction as one which tended to introduce a power into India which was likely to prove fatal to their revenues and authority. The Directors of the Company prescribed mercy and justice, but demanded an enormous revenue, which it was impossible to obtain without oppression and wrong. No restraint of moral duty or legal responsibility deterred the conquerors, while the only authority in England which they recognized, viz., the Court of Directors, virtually and practically encouraged the excesses of their administration. Scenes of misery and oppression ensued which Lord Macaulay stigmatizes as the most frightful which the world has seen, a prostrate people exposed to all the strength of civilization without its mercy.

First attempt to reorganize society.

Lord Clive, in 1765, landed in India for the third time to undertake duties as considerable and as arduous as those which devolved on William the Conqueror after the battle of Hastings. The independence of the natives was crushed, while the means at his disposal for the organization of government were of the slenderest description. He decided at once to avail himself of the outstanding sovereignty of the Mogul. The Directors of the Company stood between him and the sovereignty of the English Crown; and that source of authority, the most obvious one to resort to, was

consequently denied to him. He proceeded to obtain the grant of the Dewanny from the Mogul Emperor. 1600—1785.

That act is generally regarded as the acquisition of sovereignty by the English. The collection of revenue in India involved the whole administration of civil justice, and that, together with actual possession and military power, nearly completed the full idea of sovereignty. Still in name it was held in vassalage from the Mogul; and the Nizamut or administration of criminal justice remained with the Mogul's lieutenant, the Nabob of Moorshedabad. **Grant of the Dewanny.**

Although the grant of the Dewanny is generally regarded as the grant of sovereignty for the want of any better and more formal transference of power, yet its real motive and intention were to avoid that acquisition. It, however, vested in the Company's government the reality or the semblance of legitimate authority over the natives, which, together with the actual military power, was sufficient for the purposes of government. The view which the Directors took of the transaction is as follows:—

"We conceive * the office of Dewan should be exercised only in superintending the collection and disposal of the revenues. This we conceive to be the whole office of the Dewan. The administration of justice, the appointments to offices, zemindaries, in short, whatever comes under the denomination of civil administration, we understand, is to remain in the hands of the Nawab or his ministers".

So far, however, as authority over the English servants of the Company was concerned, whom it was Lord Clive's object firmly to restrain, the difficulties **Its effect.**

* Despatch of 17th May, 1768, and see Torren's Empire in Asia, p. 63.

CHAPTER I.

were as great as ever. His power to inflict upon them adequate punishment either for disobedience to orders or for any other species of misconduct was in a civil point of view limited to the slender powers conferred on the Mayors' Courts. Neither he nor the Directors could derive from the Mogul Emperor authority over Englishmen or Europeans. The only authority then existing in India to which they were amenable was derived from the Charter of Justice which established the Mayors' Courts in 1753. That Charter renewed the Courts of 1726, which were established in the infancy of British rule, with a view to maintain order in a few factories, and were totally inadequate to the wants of government after the battle of Plassey and the conquest of Bengal.

For, so far as Bengal was concerned, it simply empowered the Mayor's Court of Calcutta, as a Court of Record, to try all civil suits arising between Europeans within the town or factory of Calcutta, or the factories dependent upon it; it also constituted the President and Council a Court of Record, to receive and determine appeals from the Mayors; it further erected them into Justices of the Peace with power to hold Quarter Sessions; and into Commissioners of Oyer and Terminer, and general gaol-delivery for the trying and punishing of all offences, high treason excepted, committed within the limits of Calcutta and its dependent factories.

No judicial coercion over Europeans.

This extent of jurisdiction, says Mr. Mill,* measured by the sphere of the Company's possessions at the time when it was granted, withheld all powers of judicial coercion with regard to Europeans over the wide extent of territory of which they now acted as the sovereigns.

* Mill's History of India, Vol. III, p. 343.

The Company possessed indeed the power of suing or prosecuting Englishmen in the Courts of Westminster; but under the necessity of bringing evidence from India, this was a privilege more nominal than real. And in case of an Indian Governor or Judge exceeding the scanty and inadequate power which he possessed, he was liable in an action in the same Courts. **1600—1765.**

Reforms of Lord Clive.

It is fairly claimed in praise of Lord Clive that, during the twenty months in which he ruled Bengal, he effected considerable reforms. The chief was the prohibition of the private trade of the servants of the Company, and the substitution of a liberal system of remuneration. By these means the rapid acquisition of wealth was stopped, and one great motive for oppression and extortion was removed. He also, by obtaining the grant of the Dewanny, placed the government of Bengal on a legal basis, and established its relations to the natives on a footing of definite civil responsibility.

Necessity for grant of definite authority.

"The power of the English in that province", says Lord Macaulay,* "had hitherto been altogether undefined. It was unknown to the ancient constitution of the empire, and it had been ascertained by no compact. It resembled the power which, in the last decrepitude of the Western Empire, was exercised over Italy by the great chiefs of foreign mercenaries, the Ricimers and the Odoacers, who put up and pulled down at their pleasure a succession of insignificant princes, dignified with the names of Cæsar and Augustus. But as in Italy, so in India, the warlike strangers at length found it expedient to give to a domination which had been established by arms the sanction of law and ancient prescription. Theodore thought it politic to obtain from the distant Court of Byzantium a commission appointing him

* Macaulay's Essays, Vol. III, p. 186.

CHAPTER I.

ruler of Italy; and Clive in the same manner applied to the Court of Delhi for a formal grant of the powers of which he already possessed the reality. The Mogul was absolutely helpless; and, though he murmured, had reason to be well pleased that the English were disposed to give solid rupees which he never could have extorted from them in exchange for a few Persian characters which cost him nothing. A bargain was speedily struck; and the titular sovereign of Hindoostan issued a warrant empowering the Company to collect and administer the revenues of Bengal, Orissa, and Behar".

NOTE:—The text * of the Firmaund granted by the King Shah Alum to the Company in 1765 was as follows:—

At this happy time our royal Firmaund, indispensably requiring obedience, is issued; that, whereas, in consideration of the attachment and services of the high and mighty, the noblest of exalted nobles, the chief of illustrious warriors, our faithful servants and sincere well-wishers, worthy of our royal favours, the English Company, we have granted them the Dewanny of the Provinces of Bengal, Behar, and Orissa, from the beginning of the Fussel Rubby of the Bengal year 1172, as a free gift and ultumgan, without the association of any other person, and with an exemption of the payment of the customs of the Dewanny, which used to be paid by the Court. It is requisite that the said Company engage to be security for the sum of 26 lakhs of rupees a year for our royal revenue, which sum has been appointed from the Nabob Nudjum-ul-Dowla Behauder, and regularly remit the same to the royal Circar; and in this case, as the said Company are obliged to keep up a large Army for the Protection of the Provinces of Bengal, &c., we have granted to them whatsoever may remain out of the revenues of the said provinces, after remitting the sum of 26 lakhs of rupees to the royal Circar, and providing for the expenses of the Nizamut. It is requisite that our royal descendants, the Viziers, the bestowers of dignity, the Omrahs high in rank, the great officers, the Muttaseddees of the Dewanny, the manager of the business of the Sultanut, the Jaghirdars and Croories, as well the future as the present using their constant endeavours for the establishment

---

* Aitchison's Treaties (India), p. 60.

of this our royal command, leave the said office in possession of the said Company, from generation to generation for ever and ever. Looking upon them to be assured from dismissal or removal, they must, on no account whatsoever, give them any interruption, and they must regard them as excused and exempted from the payment of all the customs of the Dewanny and royal demands. Knowing our orders on the subject to be most strict and positive, let them not deviate therefrom.—*Written the 24th of Sophar, of the 6th year of the Jaloos, the 12th of August,* 1765. 1600—1765.

CHAPTER II.

EARLY HISTORY : THE REGULATING ACT.

Grant of the Dewanny—Its Consequences—Antecedent Position of the Native Courts—Native Agency in Civil Justice retained till 1772 under Supervision—The Company's Supervision thereof—Authority of Native Dewans—Supervision gradually extended—Native Agency in Criminal Justice retained—Change of Policy—The Company undertake the Administration of Civil Justice—Also of Criminal Justice—Chief Criminal Court—Chief Civil Court—Character of Warren Hastings' Plan of 1772—Interference of English Government and Public Opinion—Policy of the Directors—Policy of Parliament—The Regulating Act—Provisions for Executive Government—For Legislation—For Establishment of Supreme Court—Its Charter—Jurisdiction as a Common Law Court—As an Equity Court—As a Criminal Court—As an Ecclesiastical Court—As an Admiralty Court—Appeals to the Privy Council—Indefinite Terms of the Act and Charter—Relation of the Court to the Council—Powers of the Court, and conduct of the Judges—Failure of the Policy of the Regulating Act.

Grant of the Dewanny.

THE grant of the Dewanny was accompanied by an imperial confirmation of all the territories previously held by the East India Company under grants from the Emperor. The Nizamut or administration of criminal justice was left in the hands of the Nabob, who received for its support and his own maintenance an annual grant of 53 lakhs of rupees. He thus recognized his dependence, and although the Nizamut remained in his hands, it was, or at any time might be exercised under the control of the Company.

Its consequences.

The Company thus became responsible for the collection of the revenue, and directly or indirectly for the due administration of civil and criminal justice. Nevertheless, for a period of six years, the latter duty was as a heavy and unproductive burden left in the

1765—1774.

hands of the Nabob; the criminal part belonging to the Nazim or military governor; the civil to the Dewan or fiscal governor.* The result was that for a time the course of justice was suspended, the tribunals being without authority against the masters of the country.

Antecedent position of the native Courts.

And "under the ancient government", † says Mr. Mill, "the English, as well as other European settlers, instead of demanding payment from a reluctant debtor through the Courts of law, seized his person and confined it till satisfaction was obtained. Nor was this so inconsistent with the spirit of the Government as often to excite its displeasure. It was indeed a remedy to which they were not often obliged to recur because the profit of dealing with them generally constituted a sufficient motive to punctuality. After the power of the English became predominant, the native Courts ceased to exert any authority over Englishmen and their agents". The loss of all title to independence and the transfer to the Company of a right of ultimate control over those Courts, were not likely to increase their authority at least over Europeans.

Native agency in civil justice retained till 1772 under supervision.

But nevertheless the administration for the most part of the revenues, and still more of civil justice, was conducted through native agency till the year 1772. The country in the neighbourhood of Calcutta, of Burdwan, Midnapore, and Chittagong was under the superintendence of the Company's European servants. But the remainder of the provinces, usually called the dewanny lands, were left under the immediate management of two native Dewans, one stationed at Moorshedabad, and the other at Patna. It was not thought prudent, either by the Local Government or by the

* Mill's History of India, Vol. III, p. 363.
† *Ibid.*, p. 370.

CHAPTER II.

Directors, to vest the immediate management of the revenue or the administration of justice in the European servants. It is doubtful whether the Europeans at that time possessed sufficient knowledge of the civil institutions and the interior state of the country to qualify them for the trust.

The Company's supervision thereof.

A resident * at the Nabob's Court, who inspected the management of the Moorshedabad Dewan, and an officer of a similar position at Patna, who superintended the collections by a native of rank of the province of Behar, maintained an imperfect control over the civil administration of the Company's grants; while the zemindary lands of Calcutta and the twenty-four Pergunnahs, and the ceded districts of Burdwan, Midnapore, and Chittagong, which at an earlier period had been obtained by special grant from the Nabob of Bengal, were superintended by the covenanted servants of the Company.

Authority of native Dewans.

Mohamed Reza Khan was the Dewan at Moorshedabad, and Shitab Roy at Patna; and they had till 1769 almost exclusive direction of all details relative to the settlement and collections of the districts in Bengal and Behar, and therefore of the administration of civil justice, under the superintendence at their respective headquarters of a European resident.

Supervision gradually extended.

The work of supervision thus commenced was gradually extended until the Company was able to take into its own hands the work which it at first entrusted to the native authorities. In 1769 European local supervisors, in subordination to the two residents, were appointed; chiefly, no doubt with a view to the revenue, but also in order to superintend the judicial

* See 5th Report of Select Committee of House of Commons, dated 28th July, 1812, and 2 Harrington's Analysis, p. 2, *note*.

administration. In the next* year, 1770, two revenue councils of control, with superior authority, were appointed, one at Moorshedabad, and the other at Patna. 1765—1774.

Native agency in criminal justice retained.

With regard to criminal justice, that also was left in the hands of native authorities, subject to the occasional control of the supervisors and councils just mentioned. Mahomedan criminal law was in force throughout the country, administered by Mahomedan Courts.

At first but little alteration was made in the existing system. The same law was continued in force, and the same tribunals were charged with its administration. In the presidency town † the judicial authorities were :—1. The Nabob himself in all capital cases. 2. His deputy in cases of quarrels, frays, and abusive names. 3. The Foujdar in all cases not capital, judgment and sentence being passed by the Nabob. 4. The Mohtesil in all cases of drunkenness, selling spirituous liquors, &c. 5. The Cotwal, a peace officer of the night, dependent on the Foujdaree. In the provinces the zemindars exercised civil and criminal jurisdiction over their several districts. In capital cases they reported to the Nazim; in others they were practically uncontrolled.

The utter inefficiency of this system to ensure protection to life and property soon became manifest. It was probably impossible for the English at once to assume the duty of administering criminal justice themselves, and the native Courts were without any authority, except such as they exercised by the sufferance of the dominant party. Those who had the

* 2 Harrington's Analysis, p. 6.
† Beaufort's Criminal Digest, p. 4.

CHAPTER II.

power were obliged eventually to assume responsibility and the first steps towards that end were gradually to undertake the work of supervision. A severe famine which raged in Bengal in 1770 led indirectly to a change of policy and to the scheme which was announced in the following year of a more direct and active exercise of authority.

Change of policy.

In 1771 the Directors declared their * resolution "to stand forth as Dewan and by the agency of the Company's servants to take upon themselves the entire care and management of the revenues". This involved the entire remodelling of rights of property in the soil and the assumption of the administration of justice. It expressed the policy which had already been determined upon, viz., to abandon the government through the Nabob's hierarchy of officials subject to English supervision, and to transfer to the Company's servants the direct discharge of the duties of administration.

The Company undertake the administration of civil justice.

The next event was that Warren Hastings was transferred from Madras to the Governorship of Bengal, where he landed early in 1772. The office of Naib Dewan was abolished, and the efficient administration of the internal government was at last undertaken by British agency ;† though many years were yet to elapse before native agency could be dispensed with. Immediate measures were taken for the regular distribution of justice. A Committee of Circuit was appointed, consisting of the Governor and four members of Council, the report of which was drawn up by Warren Hastings. It drew attention to the inefficiency of the Mahomedan

---

* Communicated in their letter to the President and Council at Fort William, dated 28th August, 1771 ; see 1 Harrington's Analysis, p. 8, *note*.

† 1 Harrington's Analysis, p. 8.

law Courts then existing, and proposed a plan which was immediately adopted by the Government, under which Mofussil Dewanny Adawluts, or Provincial Courts of Civil Justice, superintended by Collectors of the Revenue, were established in each district. These Courts took cognizance of all disputes, real or personal, all causes of inheritance, marriage, and caste, and all claims of debt, disputed accounts, contracts and demands of rent. Questions of succession to the zemindary and talookdaree property were not submitted to these Mofussil or Collectors' Courts, but were reserved for the decision of the Governor in Council. 1765—1774.

Also of criminal justice.

With reference to criminal jurisdiction, the Mahomedan law and Mahomedan officers of justice were continued, but the whole plan was changed. A Court of Criminal Judicature was established in each district, called a Foujdaree Adawlut. In it a Kazee and a Mooftee, with the assistance of two Moulvies appointed to expound the law, sat to hold trials for all criminal offences.* The English Collectors of Revenue were, however, directed to superintend the proceedings of those Courts, to see that the necessary witnesses were summoned and examined; that due weight was allowed to their testimony; and that the decisions passed were fair and impartial.

Chief Criminal Court.

These Foujdaree Adawluts were placed under the control of a Sudder Nizamut Adawlut established at Moorshedabad. It was presided over by a Darogah or chief officer, appointed by the Nazim. A chief Kazee, a chief Mooftee, and three Moulvies sat to assist him. The duty of the Court was † "to revise all the proceedings of the Foujdaree Adawluts; and in capital cases,

* See preamble to Regulation IX of 1793.
† Beaufort's Criminal Digest, p. 5.

CHAPTER II.

by signifying their approbation and disapprobation thereof, with their reasons at large, to prepare the sentence for the warrant of the Nazim". An English Committee of Revenue was at first placed at Moorshedabad to control the proceedings of the Court, in order to prevent the perversion of the course of justice. The Court, however, was shortly after its establishment on its new basis removed to Calcutta, to be more immediately under the superintendence of the President and Council; and the Committee, apparently, was then abolished. In 1775 the Court was removed back again to Moorshedabad, where it remained for fifteen years, the Nazim having the entire control over the department of criminal justice.

Chief Civil Court.

Besides the Criminal Court of Appeal, a Sudder Dewanny Adawlut was also established, and, like the Criminal Court, presided over by the President and Members of Council, assisted by native officers. It exercised appellate civil jurisdiction over the Mofussil Courts in all cases where the disputed amount exceeded Rs. 500.

Character of Warren Hastings' plan of 1772.

This was the general character of the scheme devised by the Government of Warren Hastings, and it has often been warmly approved. The adoption of the policy indicated by that scheme, and the assumption of the direct responsibility of government in lieu of a mere plan of partial supervision of the Nabob's officers, has sometimes been called a dissolution of the double government instituted by Lord Clive. That is one way of regarding it; but on the other hand, the administration of justice was carried on in the name of the Nabob and by his officers for the next eighteen years, during fifteen of which the Chief Court of Criminal Appeal was stationed at Moorshedabad under his immediate control. It seems to me that it was merely

intended to be a considerable step towards a reorganization of the country, and that Warren Hastings had as little intention to dissolve, as Lord Clive to found, a double government. Both of those statesmen recognized that all real authority was vested in the Company. Both for political reasons determined that the name and shadow of authority should remain with the Mogul and his lieutenant. Mahomedan law, law officers, and revenue officials were retained, but were gradually replaced by the Company's regulations and servants. Seven years of supervision and inquiry and greater knowledge of the country and its inhabitants rendered it practicable to substitute the scheme of 1772 for the tax gathering and partial supervision o the preceding years. The decisive step of bringing Warren Hastings to Calcutta, and of standing forth as Dewan, both of which measures proceeded from the Directors, may have been stimulated by a knowledge of what was passing in the public mind at Home, and of the probable measures which Parliament might think necessary to adopt in order to discharge the duties of government which had been assumed and neglected. **1765—1774.**

Interference of English Government and public opinion.

A variety of circumstances had tended to draw the attention of the English public to the state of Indian affairs. The general unpopularity of the returned servants of the Company, their wealth and ostentation, attracted attention, and induced the public mind to believe that the sudden creation of this wealthy class was due to great crimes and great oppression. The strong prejudices thus excited served to strengthen the hands of a few English statesmen, amongst them conspicuously Edmund Burke, who had been roused by the tales of cruelty and oppression which had reached the public ear and who determined to bring the

CHAPTER II.

authority of Parliament into action to restrain the excesses of their countrymen abroad and to secure some measure of protection and good government to the territories which they had acquired.

Policy of the Directors.

In 1769 the East India Company, disappointed with their expectations of profit, had resolved to send three supervisors to India to control, and, if necessary, to supersede the authority of the President in Council. But, notwithstanding every attempt to evade the rights of the Crown, public opinion was gradually acquiring strength, and a Committee of Secrecy of the House of Commons was appointed in 1772 to carry out the general demand for investigation. As the result thereof, the Company was prevented from sending out the supervisors. Another apparent result was the rejection of a Bill brought into the House of Commons by Mr. Sullivan for the due administration of justice in Bengal. Mr. Sullivan was Deputy Chairman of the Company, and the celebrated rival and antagonist of Lord Clive on the Board of Directors. According to its provisions, a new Court was to have been established in Bengal, the Judges to be appointed by the Company, and all Christian persons were to have been subject to its jurisdiction, and to have been exempted from the Courts of the Nabob.* This project, which would have concentrated all judicial power in the hands of the Company, failed.

Policy of Parliament.

The English Government appear by this time to have determined to interfere directly with the authority of the Company, and to assume the exercise of the sovereign powers which had been conceded by the Mogul. With reference to the administration of justice,

---

* See Governor Johnstone's Speech, 30th March, 1772, referred to in Sir Charles Grey's Minute.

they were strengthened in their determination by the result of their enquiries. 1765—1774.

For the Committee of Secrecy * previously alluded to reported in 1773, with reference to the Courts of Justice which had been established by the Mahomedan Government in Bengal, that "so far as they were able to judge from all the information laid before them, the subjects of the Mogul Empire in that province derived little protection or security from any of these Courts; and that in general, though forms of judicature were established and preserved, the despotic principles of the government rendered them the instruments of power rather than of justice; not only unavailing to protect the people, but often the means of the most grievous oppressions under the cloak of the judicial character".

The Regulating Act.

Accordingly in the same year an important Act of Parliament was passed "for establishing certain regulations for the better management of the affairs of the East India Company, as well in India as in Europe", which has been commonly called the Regulating Act.† It recited the Charter which established the Mayors' Courts, "which said Charter does not sufficiently provide for the administration of justice in such manner as the state and condition of the Company's Presidency of Fort William in Bengal do and must require".

Provisions for Executive Government.

One subject with which the statute dealt was the constitution of the Governor-General's Council. It provided that the Government of Bengal should consist of a Governor-General and four Councillors, a majority to decide; and that the Presidents and Councils of

* Harrington's Analysis, Vol. I, p. 27.
† 13 Geo. III, c. 63.

CHAPTER II.

Madras and Bombay should be subordinate to the Governor-General and Council of Bengal, who were thereby constituted the Supreme Government in India, subject, however, to the Court of Directors in England.

For legislation.

By the 36th Section the Supreme Government was empowered "from time to time to make and issue such rules, ordinances, and regulations for the good order and civil government of the United Company's settlement at Fort William, and other factories and places subordinate thereto, as shall be deemed just and reasonable (such rules, ordinances, and regulations not being repugnant to the laws of the nation), and to impose reasonable fines and forfeiture for the breach and non-observance thereof".

Such regulations, however, were not to be valid or of any force until they were duly registered in the Supreme Court, with the consent and approbation of the Court. An appeal from a regulation so registered and approved lay to the King in Council, but the pendency of such appeal was not allowed to hinder the immediate execution of the law. The Government were bound to forward all such rules and regulations to England, power being reserved to the King to disapprove them at any time within two years.

For establishment of Supreme Court.

The same Act also established the Supreme Court, leaving out the distinction of Christians insisted upon by Mr. Sullivan, and placing in lieu thereof as the only criterion of personal liability to the jurisdiction that of subjection to the British Crown. By Section 14, all who are "His Majesty's subjects" were made liable. The Judges were appointed by the Crown, and it was made a King's Court, and not a Company's Court.

The establishment of the Supreme Court was, in fact, the triumph of the party in England which desired greater intervention by the English Government and Parliament in Indian affairs and greater control over the Company's proceedings. The Company desired the establishment of a system of Courts which, from the highest to the lowest, should be under their own control. The intention of the dominant party apparently was to separate the judicial entirely from the executive branch of administration, and to reserve the former entirely to the Crown. They commenced with the establishment of a Supreme Court in Bengal, which apparently, it was hoped, would, with aid from England, in time draw into its own hands the whole supervision of inferior Courts, and the whole administration of justice. **1765—1774.**

The provisions of the Act which related to the constitution of the Supreme Court were as follows :— The 13th Section empowered the King in Council by his Charter to establish the Court in Bengal, to consist of a Chief Justice and three Judges (*subsequently reduced to a Chief Justice and two Judges) who were to be appointed by the Crown and to be barristers of England or Ireland of not less than five years' standing. By the same Section it was declared that the Court should have power to exercise all civil, criminal, admiralty, and ecclesiastical jurisdiction, and to establish rules of practice and process, and to do all things necessary for the administration of justice. It was also declared that it should be a Court of Record, and a Court of Oyer and Terminer and Gaol Delivery for the town of Calcutta and factory of Fort William, and the factories subordinate thereto.

---

* See 37 Geo. III, Chap. 142, Sec. 1.

CHAPTER II.

Its Charter.

In pursuance of this Act, a Royal Charter, dated March 26, 1774, was granted, under which the Supreme Court of Calcutta was established and continued to administer justice for the period of eighty-eight years. The extent of the jurisdiction of that Court was defined by the 13th Clause of the Charter, which authorized it to try all actions and suits concerning trespasses or injuries, or debts, or concerning any houses, lands, or other real or personal property in Bengal, Behar, or Orissa brought against the East India Company, the Mayor, and Aldermen of Calcutta, and "against any other of our subjects who shall be resident within the said provinces, districts, or provinces called Bengal, Behar, and Orissa, or who shall have resided there, or who shall have any debts, effects or estate, real or personal, within the same", and against persons employed directly or indirectly by the Company, the Mayor or Aldermen, or "any of our subjects". It could also try all actions or suits against every inhabitant of India residing in Bengal, Behar, and Orissa, upon any written contract with any of His Majesty's subjects where the cause of action exceeded Rs. 500, and when the contract provided that the Court should have jurisdiction. The Charter also provided the mode in which the Sheriff of Calcutta and his successors should be for the future appointed; and authorized them to execute all process of the Court, and to receive and detain in prison such persons as should be committed to him for that purpose by the Court.

Jurisdiction as a Common Law Court.

As an Equity Court.

The Supreme Court was also constituted a Court of Equity as the Court of Chancery in England. It was also constituted a Court of Oyer and Terminer and Gaol Delivery for Calcutta and Fort William and the factories subordinate thereto, with power to summon grand and petit juries, and to administer criminal

justice as in the Courts of Oyer and Terminer in England with jurisdiction over all offences committed in Bengal, Behar, and Orissa, by any subject of His Majesty or any person in the service of the United Company, or of any of the King's subjects. 1765—1774. **As a Criminal Court.**

As an Ecclesiastical Court. The Court was also empowered to exercise ecclesiastical jurisdiction in Bengal, Behar, and Orissa towards and upon British subjects then residing in the same manner as it is exercised in the diocese of London, "so far as the circumstances and occasions of the said provinces or people shall admit or require": and to grant probates and administrations to the estates of British subjects dying within the said provinces. The Court was also empowered to appoint guardians of infants and of insane persons and of their estates.

As an Admiralty Court. It was also appointed to be a Court of Admiralty for the provinces of Bengal, Behar, and Orissa, "and all other territories and islands adjacent thereunto, and which are or ought to be dependent thereupon", with power to hear and determine all causes and matters, civil and maritime, and to have jurisdiction in crimes maritime, according to the course of the Admiralty in England.

Appeals to the Privy Council. In civil cases an appeal lay to the Privy Council in such manner and form and under such rules as were observed in appeals from plantations or colonies, or from the Islands of Jersey, Guernsey, Sark, and Alderney. In criminal cases power of appeal was also given, but subject to considerable restrictions.

Both the Act of Parliament and the Charter which was granted in pursuance of it provided that the former Charter of the 26th of Geo. II should become null and void, so far as the Mayors' Court in Fort William was concerned. Thus the Supreme Court was the

CHAPTER II.

only tribunal in the country, with the exception of the Court of Requests and a few inferior authorities, which owed its existence to the English Crown. The Adawluts established under the plan of Warren Hastings derived their authority from the Company, whether acting under the powers derived from the Mogul, or as the *de facto* masters of the country.

Indefinite terms of the Act and Charter.

Besides the inconveniences arising from political power being vested in a majority of Council, instead of in a responsible Governor, there were serious omissions, whether intentional or otherwise, in the provisions regarding the Supreme Court. Although the Act was intended to be the basis of a general settlement of Indian affairs, in a very few years its policy was entirely reversed, and its leading features swept away. The criticism of some later Judges of the Supreme Court upon it was "that * the Legislature had passed it without fully investigating what it was that they were legislating about; and that if the Act did not say more than was meant, it at least said more than was well understood".

For instance, subjection to the English Crown was made the ground of liability to the jurisdiction of the Court. But "there was not", as Sir Charles Grey pointed out,† "either in the Statute or in the Charter any declaration who are and who are not subjects, nor whether any of the territorial acquisitions amounted to an acquisition of the territory itself, or to anything more than powers to be exercised within territories of the Mogul, nor whether even Calcutta itself was so much within the allegiance that persons born there would be

---

* See 5th Appendix to 3rd Report of Select Committee of the House of Commons, 1831, p. 1234.

† *Ibid.*, p. 1143.

natural-born subjects of the British Crown". Those questions which were all of the greatest importance were left doubtful to be decided by the Court, whenever they might arise. Subject to such decision, the jurisdiction given to the Court was,* "first, over all persons whatsoever during their residence in any British territory, possession, or factory within Bengal, Behar, or Orissa; secondly, over all natural-born subjects or others having indefeasibly the character of subjects of the British Crown; and over persons in their service within Bengal, Behar, or Orissa, whether the place in which they might be were a British territory, possession, or factory, or a place belonging to some Indian prince, but under the protection of the Company. The intention was to have secured to the Crown a supremacy in the whole administration of justice, but the provisions made were inadequate to the attainment of the object, and have been defeated". 1765—1774.

Relation of the Court to the Council.

Thus there were established in India two independent and rival powers, viz., of the Supreme Council and of the Supreme Court, the boundaries between them being utterly undefined, one deriving its authority from the Crown, and the other from the Company. For seven years the conflict between them raged. The Court issued its writs extensively throughout the country, arrested and brought to Calcutta all persons against whom complaints were lodged, zemindars, farmers, and occupiers of land, whatever their rank or consequence in the country. Defaulters to the revenue were set at liberty on *habeas corpus*; the government of the Nabob, which still remained in the hands of the Company, the effectual instrument for the

* See 5th Appendix to 3rd Report of Select Committee of the House of Commons, 1831, p. 1234.

Chapter II.

administration of Criminal Justice, was declared by the Court to be "an empty name, without any legal right, or the exercise of any power whatsoever"; * and the production in Court of papers containing the most secret transactions of Government was insisted upon. The Court was charged with stopping the wheels of Government by the technicalities of English law, and of effecting a total dissolution of social order.

Powers of the Court, and conduct of the Judges.

Although it is impossible to defend the acts of the Judges, it must be remembered that their position was from the first antagonistic to the Council; and that they carried out in India a scheme which had been prepared in England without adequate information or competent skill for the purpose of checking the excesses of administration and of re-establishing order on principles totally strange to the inhabitants. The essential character and object of that scheme were to weaken the power of the Government by vesting it in the hands of a majority, and to plant in its neighbourhood a Court, framed after the fashion of the existing Courts in England, with jurisdiction over all its executive acts and a veto on all its legislation. This tribunal, vested with such extraordinary powers, and so ludicrously unsuited to the social and political condition of Bengal, was not merely to exercise a civil and criminal jurisdiction wholly strange and repugnant to the Indian people; it might sit one day on its common law side and give judgment to a suitor, and on the next day might sit on its equity side and restrain that suitor from proceeding to execution. It might on one side adjudge a man to be the absolute owner of property, and on the other side consign him to perpetual imprisonment if he did not, in his character

* Mill's History of India, Vol. IV, p. 223.

of trustee, forthwith give it up to those beneficially entitled. In short, the whole system of English law and equity, with its rules and customs and process, handed down from feudal times, moulded during struggles between secular and ecclesiastical powers, between church and commonalty, between common law and civil jurisprudence, which time alone had rendered endurable to the people amongst whom it had grown up, a people widely different in habits, character, and form of civilization from any to be found in the East, was introduced into India, not intentionally as a burden, but for its benefit and salvation. 1765—1774.

Failure of the policy of the Regulating Act.

The result was that the Court exercised large powers independently of Government, often so as to obstruct it, and had a complete control over legislation. Political power was thus vested in Judges who had neither the responsibilities nor the machinery of government. Such a system could not endure under any circumstances. Although the Courts are independent of Government in England, both are absolutely subordinate to the Legislature, in which, however, the power of Government predominates To make the Legislature subordinate to the Court, instead of the Court subordinate to the Legislature, and at the same time to direct it to enforce a system of law utterly inapplicable to India, independently of or in opposition to the Government, which was at the same time weakened by divisions purposely created, appears to be the most destructive and pernicious policy that wit could devise. Although the judicial service should be independent of the executive, yet it must be subordinate to the Legislature, and legislation must be, if power and responsibility are to go together, the unfettered expression of sovereign authority, wherever that authority may reside, or from whatever source it be

CHAPTER II.

derived, whether from an electoral body or an absolute prince.

The plan of controlling the Company's government by the King's Court entirely failed. The tribunal came to be regarded by the Natives, for whose protection it was established, with the utmost abhorrence. The policy which shaped the Regulating Act was, no doubt, well-intentioned, but it was rashly and ignorantly executed. None of the Parliaments of George III were remarkable for their wisdom ; but it was reserved for the Parliament which sat in 1773 by its Colonial Customs Policy and its Regulating Act to throw the affairs of two hemispheres into confusion. It endeavoured to rule America on the principle of parliamentary taxation, and to control the government of India by the operation of English law Courts. The result was that British power in the West was subverted, and in the East was for a time seriously endangered*. The anarchy which ensued continued till the policy of the Regulating Act was reversed, and Indian society assumed the form which it retained till the Company and the Mogul Empire vanished.

---

* It is remarkable that the United States of America on attaining independence adopted a constitution which had for its coping-stone a judicial tribunal bearing the identical designation and possessing approximately the same powers of vetoing legislation and restraining executive action. The "Supreme Court" experiment failed in the nascent British Indian Empire but succeeded in the erstwhile British Colonies in America, for reasons which had not been anticipated by the makers of the constitutions in either instance. These disclosed themselves in events which happened subsequently. For the special conditions which made for its success in America, *see* Dicey, Law of the Constitution, Part I, Ch. III. As to the Indian situation, cf. Ilbert, Government of India, Ch. I, and Ghose, Comparative Administrative Law (Tagore Law Lectures, 1918), pp. 107-113.—EDITOR.

CHAPTER III.

EARLY HISTORY: THE SETTLEMENT OF 1781.

Consequences of the Regulating Act—Political events immediately preceding it—The new Council—Its dissensions—First exercise of power by the Supreme Court—Character of its proceedings—Consequences thereof—Upon the Revenue and Civil Justice—Upon Criminal Justice—Proceedings of the Court against individuals—Proceedings of the Court against the authorities—Crisis of the disputes—Conduct of Parliament—Conduct of the Company—Conduct of the Judges—They did not exceed their jurisdiction—Act of 1781—Limits set to the jurisdiction of the Supreme Court—The Governor-General and Council excepted therefrom—English Law no longer applicable to Natives—Power to frame suitable process—Recognition of the Provincial Courts—Indemnity—The Settlement of 1781—Indefiniteness of the jurisdiction—Distinction between Presidency Towns and Mofussil perpetuated—After the Settlement.

Consequences of Regulating Act.

THE Bengal Government and the English Parliament had thus in 1774, by their combined efforts, established a political and judicial system in the Lower Provinces. The events of the next seven years showed clearly that, whether from the antagonism of the local authorities, or from inherent faults, the provisions of the Regulating Act were unsuited to the wants of the country. Those events deserve some study and consideration, as they throw considerable light on the subsequent history and account for the crude and unsatisfactory condition in which the judicial, if not the legislative, institutions of the country were placed for very nearly a century.

Political events immediately preceding it.

Before the arrival of the Regulating Act, Mahomed Reza Khan and Shitab Roy, the two dewans of Moorshedabad and Patna, had been removed by the Governor from their positions of authority and trust. Nuncoomar, the celebrated Brahmin of Bengal, had for

CHAPTER III.

some time been the implacable enemy of the former, but had lately transferred his animosity to Mr. Hastings. The subjugation of the Rohilas, both as to its policy and the manner in which that policy was executed, gave rise to serious questions as to the conduct of the Government.

The new Council.

Mr. Hastings was named in the Act Governor-General, with Mr. Barwell, an experienced Indian Administrator, as one of his Councillors; but three Englishmen, new to India and its politics, General Clavering, Mr. Monson, and Mr. Francis, were also appointed to outvote him in his own Council. Sir Elijah Impey, as Chief Justice of the Supreme Court, arrived with three Puisne Judges, to exercise an immense and undefined civil and criminal jurisdiction. The majority of the Council took the government into their own hands, condemned and reversed the previous policy of the Governor-General; interfered in the affairs of Madras and Bombay, and in the intestine disputes of the Mahratta Government. "At the same time * they fell on the internal administration of Bengal, and attacked the whole fiscal and judicial system, a system which was undoubtedly defective, but which it was very improbable that gentlemen, fresh from England, would be competent to amend. The effect of their reform was that all protection to life and property was withdrawn, and that gangs of robbers plundered and slaughtered with impunity in the very suburbs of Calcutta". †

Its dissensions.

One result of the confusion thus introduced was that Nuncoomar, seeing that the power of the Governor-General was at an end, stood forth to accuse him of

* See Macaulay's Essays, Vol. III, p. 365.
† See further, Chapters VIII and IX.

having been bribed to dismiss Mahomed Reza Khan and other offenders with impunity, and of having sold several public offices. The notorious Francis, one of the most malignant and impracticable men that ever meddled with public affairs in England or in India, read the paper of accusation at the Council Board in presence of the Governor-General, and also a communication from Nuncoomar requesting to be heard in support of his accusation. The Governor-General refused to be confronted with an accuser at his own Council Board, and also to allow his Councillors to sit in judgment upon him. He accordingly dissolved the meeting and departed. The majority voted Clavering into the chair, called in Nuncoomar, and decided to go on with the charges. With dissensions of this grave character in the Executive Council, all government was practically at an end, and public affairs were at a dead-lock. It is impossible to believe that in any country but Bengal, cowed by disaster and decimated by famine, the footing of conquerors who governed in this spirit could have been maintained. 1774—1781.

First exercise of power by the Supreme Court.

With the counsels of the Executive thus divided and distracted, the Supreme Court first put forward its new authority; and to the astonishment of the Natives, an executive government, armed with despotic power, was baffled and vanquished by a Court of Justice, which sat in the neighbourhood, and to which no executive or administrative functions had been assigned. In the history of Bengal, Courts had always been subject to the Government, and were the instruments of its will and pleasure, alike in collecting revenue, inflicting punishment, and deciding disputes. Nuncoomar was supported by the whole force of the Executive, and doubtless fancied himself secure. But he was suddenly arrested, and committed to the common

CHAPTER III.

gaol, on a charge of having six years previously forged a bond. The Council protested and remonstrated, but a jury of the Supreme Court convicted, and Nuncoomar was sentenced to be hanged, and was accordingly executed. He deserved his fate; but in the machinations and intrigues which terminated so fatally for him, his miscalculations were due entirely to an utter incapacity to understand the nature of the new power which had been established in his country. His death showed to his countrymen that thereafter the possession of political power and the support of the Executive were no protection against this new and powerful tribunal.

Although the trial of Nuncoomar was regarded with very different feelings by the two factions in the Council, yet in the long contest which subsequently ensued between the Council on the one side and the Court on the other, it is remarkable that both factions were unanimous in every step that was taken. It was the one subject upon which Hastings and Francis were in accord. In no country were two powers ever placed side by side so utterly irreconcilable.

Character of its proceedings.

The Court issued its writs against the zemindars of the country at the suit of private persons; zemindars were ordered to Calcutta; and if they neglected the writ, they were seized upon their estates, and forcibly brought up to the Presidency. They were there compelled to give bail, or else were consigned to the gaol, which seems to have been a place unfit for the habitation of human beings, and were detained during the progress of the suit. Arrest to an Indian of rank is the deepest degradation, but the Supreme Court, as an English tribunal administering English law, did not take into consideration either the circumstances of the country or the feelings of the Natives to such a degree

as to abolish any rule of procedure and of law which it was established in order to administer. " And ", says Mr. Mill,* speaking of the law and procedure as they existed at the time the Supreme Court was founded, " the language of that law, its studied intricacies and obscurities which render it unintelligible to all Englishmen who have not devoted a great part of their lives to the study of it, rendered it to the eye of the affrighted Indian a black and portentious cloud, from which every terrific and destructive form might at each moment be expected to descend upon him. Whoever is qualified to estimate the facility and violence with which alarms are excited among a simple and ignorant people, and the utter confusion with which life to them appears to be overspread, when the series of customs and rules by which it was governed is threatened with subversion may form an estimate of the terrors which agitated the Natives of India when the process of the Supreme Court began to operate extensively among them ". 1774—1781.

Consequences thereof.

The absence of so many zemindars (an affidavit of any Native being sufficient to procure a writ) struck a serious blow at the collection of revenue. Moreover, the Dewanny Adawluts were in the habit of enforcing claims for rent and revenue by a summary process. But the Supreme Court began to interfere with their coercive process; and their writs of *habeas corpus* were an additional source of embarrassment to the members of Government. Their interference destroyed the authority of the Provincial Courts, and rendered the collection of revenue a thing almost impossible.

Upon the revenue and civil justice.

Again, the whole administration of criminal justice was in the hands of the government of the Nabob, and carried out by its agency and authority. The Supreme

Upon criminal justice.

* Mill's History of India, Vol. IV, p. 220.

CHAPTER III.

Court declared that they would not recognize that government, and that their jurisdiction extended over all the dominions of the Nabob.

A summary is thus given of some of the proceedings of the Court* :—

Proceedings of the Court against individuals.

"Persons confined by the Courts of Dewanny Adawlut are collusively arrested by process from Calcutta, or removed by *habeas corpus* where the language is as unknown as the power of the Court. The process is abused to terrify the people; frequent arrests made for the same cause; and there is an instance of the purchaser of a zemindary near Dacca who was ruined by suits commenced by paupers, suits derived from claims prior to his purchase, and who was at last condemned in considerable damages for an ordinary act of authority in his station. Hence the Natives of all ranks become fearful to act in the collection of revenues. The renters and even hereditary zemindars are driven away, or arrested at the time of the collections, and the crops embezzled. If a farm is sold on default of payment, the new farmer is sued, ruined, and disgraced. Ejectments are brought for land decreed in the Dewanny Adawlut. A talookdar is ruined by the expense of pleading to the jurisdiction, though he prevails. And in an action where Rs. 400 were recovered, the cost exceeded 1,600 rupees. When to these abuses incident to the institution of the Court itself, and derived from distance and the invincible ignorance of the Natives respecting the laws and practice of the Court, we add the disgrace brought on the higher orders, it will not perhaps be rash to affirm that confusion in the provinces and a prodigious loss of revenue must be the inevitable consequence of upholding this

* Mill's History of India, Vol. IV, p. 237.

jurisdiction. One zemindar upon pretence that he had been arrested, and afterwards rescued, has his house broken open, and even the apartments of his women rudely violated. Another zemindar surrenders himself to prison to avoid the like disgrace to his family ". 1774—1781.

Proceedings of the Court against the authorities.

Prosecutions were carried on by the Supreme Court against the Judges of the Revenue and Civil Courts for acts done in the regular performance of their business, and by these means the course of justice was entirely suspended. " Who are the Provincial Chief and Council of Dacca ? " asked the Supreme Court in reference to the governing body of a great province. " They are no *corporation* in the eye of the law. The Chief and Provincial Council of Dacca is an ideal body. A man might as well say he was commanded by the King of the Fairies as by the Provincial Council of Dacca, because the law knows no such body ". They held also that Native Magistrates, who were appointed by the Provincial Councils to investigate cases, were liable in damages at the suit of every person affected by their proceedings.

In 1777, the Supreme Court entertained an action for trespass and false imprisonment against the dewan or principal officer of the Criminal Court at Dacca. The action was brought by a peon who had been convicted in that Court and imprisoned. The Supreme Court ordered the defendant to be arrested, that last disgrace to a Mahomedan of rank. The bailiff entered the house of the Judge, and attempted to seize the dewan. He was prevented, and thereupon attended by a crowd, he broke open the gate of the house, and in the affray the Judge was dangerously wounded. It ended by the Provincial Council giving bail for the dewan. "All criminal justice", said the Governor-General in Council, " is at a stand and seems not likely

CHAPTER III.

to be resumed. How can a Judge perform any function of his office ? How presume to execute a criminal convicted and sentenced to death by the established laws of the Government and his religion if he is liable himself to stand to actions of damages, or to answer to a criminal accusation according to the laws of England for any punishment he may inflict ? "

The action of the Court was thus directed to render the management of the territorial revenue and the administration of civil and criminal justice subject to the jurisdiction of the King's Court. The Governor-General and Council declared that by the acts and declarations of the Judges the Company's office of Dewan was annihilated, the country government subverted, and they and their officers acting under their authority were threatened with the pains and penalties of high treason. The Judges asserted that their power derived directly from the Crown was greater than that of the Council which was derived from the Company, and that their duty was by the inherent force and vigour of English law to restrain the Executive, and to protect the Natives.

So general was the sense of oppression and insecurity that, in the Province of Behar, the farmers and land-owners petitioned the Governor in Council, praying for protection against the process of the Supreme Court, or if that could not be granted, for leave to relinquish their farms that they might retire into another country.

Crisis of the disputes.

The case in which the disputes reached a crisis was this. In 1779 the Rajah of Cossijurah absconded to avoid the execution of a writ of the Supreme Court. Another writ was issued to sequester his land and effects. Sixty men, headed by a serjeant of the Court,

were sent to execute it. The Rajah complained that they entered his house, beat and wounded his servants, broke open and forcibly entered his zenana, stripped his place of religious worship of its ornaments, and prohibited his farmers from paying their rents. The Governor-General and Council instructed the Rajah not to obey the process of the Court, and ordered the troops to intercept the party of the Sheriff, and to detain them in custody till further orders. The Government also issued a notification to all zemindars and others in the three provinces that, except in the two cases of their being British servants, or bound by their own agreement, they were not to obey the process of the Court. The Supreme Court took proceedings against the Company's attorney and the officers who seized the Sheriff's party. The attorney was thrown into prison, and finally the Governor-General and Council were at last individually served with a summons at the suit of the decree-holder whose process of execution they had disturbed. They declined to appear, and a petition signed by the principal British inhabitants in Bengal went home to Parliament against the exercise which the Supreme Court was making of its power. 1774—1781.

The rule of the Supreme Court is described by* Lord Macaulay as a reign of terror; "of terror heightened by mystery; for even that which was endured was less horrible than that which was anticipated. No man knew what was next to be anticipated from this strange tribunal; it came from beyond the black water, as the people of India with mysterious horror called the sea; it consisted of Judges not one of whom was familiar with the usages of the millions over whom they claimed boundless authority. Its records were

* Macaulay's Essays, Vol. III, p. 388.

CHAPTER III.

kept in unknown characters; its sentences were pronounced in unknown sounds. * * * No Mahratta invasion had ever spread through the province such dismay as this inroad of English lawyers; all the injustice of former oppressors, Asiatic and Europeans, appeared as a blessing compared with the justice of the Supreme Court".

Conduct of Parliament.

This unexampled scene was the direct and inevitable result of the legislation which sought, by introducing an off-shoot from Westminster Hall in an unknown country whose form of civilization, religion, and habits were inflexible from their age, and utterly strange to the English Parliament, to re-establish society with the aid of a foreign and totally inapplicable class of laws. The statesmen who adopted this policy, and framed the Regulating Act, were chiefly responsible for the consequences. The accusations which, in the bitterness of those times, were levelled against the Judges seem to have been disproved. They were the ministers of a system, carrying out the objects and purposes of their judicial existence.

No doubt the Court was directed by its charter to accommodate its process to the circumstances of the people and the country. This was done to some extent, but it must be remembered that to do so successfully required more co-operation and support from the Executive than the Court was likely to obtain or did in fact meet with. It excited and undoubtedly experienced great opposition from the servants of the Company.* The first obstacle which it encountered was the upholding of the Nizamut under the Nabob and his Native officers in a state of complete independence

Conduct of the Company.

* Sir C. Grey's Minute, see 5th Appendix to the Third Report of the Select Committee of the House of Commons (1831), p. 1145.

of it. The Chief Court of the Nizamut was transferred from Calcutta to Moorshedabad immediately after the Court began to exercise its powers. Probably, if Mr. Sullivan's Bill (see *ante*, p. 34) had passed, the Company would have brought the whole of the Native Courts into subordination to the Court established by it. And when the Supreme Court was substituted, the jurisdiction similar to that of the King's Bench which was given to it, indeed its very title and the objects of the whole Charter, showed that it was supposed that there would have been inferior Courts subjected to its superintendence. A system corresponding to such intentions could not have been established without the cordial co-operation of the Governor-General and Council of the time, and probably it ought not to have been attempted but by very slow and cautious steps, and supplementary enactments must have been made for securing the Hindus and Mahomedans against an abrupt demolition of their customs and usages. But instead of any preparations of such a tendency, all things were maintained in a posture rather of opposition than merely of separation. It may be said, therefore, in justification of the Judges, that there was not that co-operation which they had expected from the Government; that the re-establishment in 1775 of the Nizamut at Moorshedabad in its old form was not a symptom of any inclination to promote that subordination of the Provincial Courts which was looked for, and which would have been gradually accomplished if the Supreme Court had been a Court of the Company. 1774—1781.

Conduct of the judges.

And further, in criticizing the conduct of the Judges, some allowance must be made for the novelty of their position and their consequent ignorance of their relative and absolute duties. They were English

CHAPTER III.

lawyers sent out expressly to administer English law; they had been educated in a belief of its comprehensiveness and perfection.* "They knew nothing of India, had never heard of Hindu or Mahomedan law, and would have despised it if they had: they had been accustomed to know that gross abuses of law and justice prevailed in India, and they imagined it to be their first of duties to show that they would resolutely exert the powers which they thought that they possessed for the extension of the principles of the only law which they conceived to be capable of protecting the interests of society. That they entertained a mistaken opinion of their own dignity and an equally unfounded contempt for the Company's functionaries originated in the same cause, and to ignorance may be referred the origin of their indiscretion and intemperance".

No doubt at the time great passions and animosity were excited, and charges were made against the Judges of exceeding their jurisdiction, and against Sir Elijah Impey in particular of gross dereliction of duty. But these charges will not bear examination; and the personal question in these days readily yields to the interest of the political situation.

They did not exceed their jurisdiction.

And with regard to exceeding their jurisdiction, that charge also in general cannot be sustained. The Act of 1781 was passed, not because the jurisdiction had been exceeded, but because it had been found difficult to exercise it without conflict with the Provincial Courts and the Government; in short, because the Act of 1773 had proved to be a ruinous mistake. The 28th Section provided indeed an indemnity for the Governor-General in Council and the Advocate-General for their transgressions of the law in opposition to

---

Mill's History of India, Vol. IV, p. 242.

the Judges, but no such indemnity will be found to have been granted or required for the Judges themselves. Parliament, no doubt, felt that the Act had been a failure, not because it had been misapplied, but because it was wholly inapplicable and unsuited to the wants of the country. **1774—1781.**

Act of 1781.

The Act of 1781 (21 Geo. III, c. 70) was passed to explain and amend the Act of 1773, "and for the relief of certain persons imprisoned at Calcutta under a judgment of the Supreme Court, and also for indemnifying the Governor-General and Council and all officers who have acted under their orders or authority in the undue resistance made to the process of the Supreme Court". It recited that doubts and difficulties had arisen with regard to the provisions of the Act of 1773 and the Charter which had been issued under it, and that "by reason thereof dissension hath arisen between the Judges and the Governor-General and Council and the minds of many inhabitants subject to the Government have been disquieted with fears and apprehensions, and further mischief may possibly ensue from the said misunderstandings and discontents if a seasonable and suitable remedy be not provided". And then the preamble proceeded, "whereas it is expedient that the lawful Government of the provinces of Bengal, Behar, and Orissa should be supported, that the revenues thereof should be collected with certainty, and that the inhabitants should be maintained and protected in the enjoyment of all their ancient laws, usages, rights, and privileges".

Limits set to the jurisdiction of the Supreme Court.

It was expressly declared by that Act that the Supreme Court should not have any jurisdiction in any matter concerning the revenue or concerning any acts ordered or done in the collection thereof according to the practice of the country, or the regulations of the

CHAPTER III.

Governor-General and Council. Further, it was declared that no person should be subject to its jurisdiction by virtue of possessing any interest in, or authority over, lands or rents within Bengal, Behar, or Orissa, or by reason of his becoming security for the payment of such rents. Employment of a person, directly or indirectly, by the Company, or the Governor-General and Council, or by a native of Great Britain, was declared not to subject such person to the jurisdiction of the Court in any matter of inheritance or succession to lands or goods, or in any matter of dealing or contract between party or parties, except in actions for wrongs or trespasses, and also except in any civil suit by agreement of parties in writing to submit the same to the decision of the said Court. Further no action for wrong or injury should lie in the Supreme Court against any person whatsoever exercising a judicial office in the country Courts for any of his judicial decisions, nor against any person acting thereunder.

The Governor-General and Council excepted therefrom.

The former Act had declared the Supreme Court incompetent to try any indictment against the Governor-General or any of the Council for the time being for any offence not being treason or felony which such Governor or any of his Council should be charged with having committed in Bengal, Behar, or Orissa. The Governor-General and Council and Chief Justice and Judges were declared not to be liable to arrest or imprisonment upon any action, suit, or proceeding in the Court. The later Act declared that the Governor-General and Council should not be subject jointly or severally to the jurisdiction, of the Supreme Court "for or by reason of any act or order, or any other matter or thing whatsoever, counselled, ordered, or done by them in their public capacity only and acting as Governor-General and Council". It was also provided that the

order of the Governor-General and Council in writing should amount to a sufficient justification of all acts done thereunder; except that where British subjects were concerned, the Court should retain its jurisdiction.

English law no longer applicable to Natives.

With reference to the inconveniences which had arisen from applying English law to the Natives, the Supreme Court was, by the 17th Section of the new Act, empowered to determine all actions and suits against the inhabitants of the city of Calcutta: provided that their succession and inheritance to lands, rents, and goods, and all matters of contract and dealing between party and party, should be determined in the case of Mahomedans by the laws and usage of Mahomedans, and in the case of Gentoos by the laws and usages of Gentoos; and where only one of the parties should be a Mahomedan or Gentoo by the laws and usages of the defendant. And in order that regard should be had to the civil and religious usages of the Natives, it was enacted that the rights and authorities of fathers and masters of families, according as the same might have been exercised by the Gentoo or Mahomedan law, should be preserved to them; "nor shall any acts done in consequence of the rule and law of caste respecting the members of the said families only be held and adjudged a crime, although the same may not be held justifiable by the laws of England".

Power to frame suitable process.

It was also provided that the Supreme Court might frame such process and make such rules and orders for the execution thereof in suits, civil or criminal, against the Natives of the presidency as might accommodate the same to the religion and manners of the Natives, so far as the same might consist with the due execution of the laws and attainment of justice. Such rules and orders were to be subject to the royal approbation, correction, or refusal.

CHAPTER III.

Recognition of the Provincial Courts.

But perhaps the most important part of the Act, and the one which most completely reversed the policy of the Act of 1773, was the recognition by Parliament of the Civil and Criminal Provincial Courts, existing independently of the Supreme Court; and of the Governor-General and Council or some committee thereof, as the Chief Appellate Court of the country, and the vesting the Council with the power to frame Regulations for those Provincial Courts independently of the Supreme Court. The Sections are as follows:—

Section 21.—And whereas the Governor-General and Council, or some committee thereof, or appointed thereby, do determine on appeals and references from the country or Provincial Courts in civil causes, be it further enacted that the said Court shall and lawfully may hold all such pleas and appeals in the manner and with such powers as it hitherto hath held the same, and shall be deemed in law a Court of Record; and the judgments therein given shall be final and conclusive; except upon appeal to His Majesty, in civil suits only, the value of which shall be £5,000 and upwards.

Section 22 gave the Court power to determine on all offences, abuses, and extortions committed in the collection of revenue, or of severities used beyond what was customary or necessary to the case, and to punish the same, provided the punishment should not extend to death or maiming, or perpetual imprisonment.

Section 23.—And it is hereby enacted that the Governor-General and Council shall have power and authority from time to time to frame Regulations for the Provincial Courts and Councils. A proviso was added that His Majesty in Council might disallow or amend them within two years.

Indemnity.

The Act also declared that no action should lie in the Supreme Court against any judicial officer in the country Courts in respect of any judgment or order of his Court, nor against any person for any act done in pursuance of such order; it being considered "reasonable to render the Provincial Magistrates, as well Native as British subjects, more safe in the execution of their office".

And finally, with regard to the indemnity in respect of the hostilities which had been carried on between the Court and the Council, wherein said the Act "many things have been done not justifiable by the strict rule of the law", it was enacted that the Governor-General and Council and Advocate-General and all persons acting under their orders, so far as the same related to the resistance to any process of the Supreme Court from January 1, 1779, to January 1, 1780, were thereby indemnified, discharged, and saved harmless from any action, suit, or prosecution whatsoever on account of the said disobedience and resistance to the execution of the orders of the Court.

The Settlement of 1781.

Thus within eight years the main provisions of the Regulating Act were swept away. The Supreme Court, however, continued to exist, and ultimately, with its diminished powers and pretensions, won its way to greater authority and respect, both from Europeans and Natives, than any other tribunal which has ever existed in India. Nothing, however, in its subsequent history serves to justify or excuse the policy of its founders. Their attempt to introduce an English superintendence of law and justice on the part of the Crown, and an administration of English rules of law and equity by an English Court, modelled according to English fashion, was made rashly and ignorantly, without any sufficient

CHAPTER III.

scheme or due preparation, without any measures being taken to ensure the co-operation of the local authorities, but on the contrary with every attempt to impose upon them a policy to which they were opposed, and which they were determined to subvert.

Indefiniteness of the jurisdiction.

But in the Act of 1781, as in that of 1773, there is no plain statement of the relation in which the Indian territories stood to the British Crown, nor whether any Indian natives were to be comprehended under the term "subjects", nor whether* the Provincial Courts were to have a concurrent jurisdiction with the Supreme Court, or an exclusive one; nor, if the latter, what were to be the limits of it. The phrase "British subjects" is used in both Acts in such a way as necessarily to exclude from its meaning the Hindu and Mahomedan inhabitants; but it is so used that, with respect at least to subjects not being natives of Great Britain or India, subsequent glosses made it almost impossible to affix any definite understanding to it.

Distinction between Presidency Towns and Mofussil perpetuated.

The result of the two Acts was that the distinction between Presidency Towns and Mofussil which originated in the distinction between the Company's factories and the Mogul territory was perpetuated. At the distance of nearly a century (1872), it still existed. The influence of the Presidency Town system was, since the Act of 1781, but thinly scattered over the Mofussil, and the disputes and inconveniences which arose were temporary and occasional. The subsequent pages will show the steady progress which has, since the abolition of the Supreme Court in 1861, been made towards obliterating this distinction and securing uniformity in the administration of justice.

---

* Sir C. Grey's Minute.

The Act of 1781 at all events settled the difficulties which had arisen under the Regulating Act, and the settlement, crude and unsatisfactory as it was, was copied in the other Presidencies, and endured so long as the Company and the Mogul Empire existed. 1774—1781.

In Bengal a revised Code was issued in the same year as this important Act. Very little legislation had been effected under the Regulating Act; though, under the Act of 1781, a large body of Regulations continued to be passed for half a century. Thus the Act of Parliament, the Revised Code, the Parliamentary recognition of the Sudder and Provincial Courts, the grant of legislative authority apart from the veto of the Supreme Court, the restriction of the powers of that Court, and the declaration of the right of Hindus and Mahomedans to their own laws and usages, were effected in 1781. A complete settlement was made sufficient to form the foundation of the Indian polity for three generations, and to mark the commencement of a new era in Indian History. After the Settlement.

In that era the Supreme Court acquired authority and renown; and English lawyers in India have laid the foundation of a complete system of Anglo-Indian jurisprudence. They have carried out the ultimate end and object of the Regulating Act—an object which has redeemed the character of the Statute, and of its immediate policy—viz., to teach both rulers and subjects in the East that respect for law which is the foundation of social order and the greatest gift which England has had in its power to bestow on India. The angry opposition which has been at times excited has died away, and as India is now united under a monarchy which is itself limited by law, and is settling down, even in its farthest provinces, into a

CHAPTER III.

law-governed country, the wishes of the authors of the Regulating Acts which they so utterly failed to accomplish may be said to have been ultimately fulfilled.

When the subsequent history of the legislative authorities and related institutions which have from time to time been brought into existence, of the Supreme Courts and other judicial authorities established in the Presidency Towns, and of the Civil and Criminal Courts of the country shall have been traced for another eighty years, we shall arrive at a new epoch, the date from which nearly all existing legislative and judicial authority derives its origin.

CHAPTER IV.

THE LEGISLATIVE COUNCILS.

Two-fold power of legislation given—Extent of the first power—Extent of the second—Excessive exercise of the powers—Parliamentary recognition thereof—Mode of exercising legislative power prescribed—Legislative power at Madras—At Bombay and Madras—Extent of the power—Extension of legislative authority in 1813—Power of taxation—Jurisdiction of the Legislature—Regulations to be laid before Parliament—Reservation of Sovereignty of the Crown—Power to make Articles of War—Customs—Power to alter the revenue and impose new taxes—Statute Law in 1834—Necessity for reform in the Legislature—The Act of William the Fourth—Provision relative to legislation—Indian Law Commissioners—Local Legislatures superseded—Articles of War—Conclusion.

Two-fold power of legislation given.

THE extent of the legislative power granted by Parliament to the Company during the early period which preceded the passing of the Regulating Act has been already described. The most important exercise of that power, whether within or in excess of its terms it is unnecessary now to enquire, occurred in 1772. In that year the President* and Council of Bengal made and ordained certain general regulations for the administration of justice, by virtue of which certain Courts, both Civil and Criminal, such as have already been described, were established throughout the Lower Provinces of Bengal, with certain definite rules of procedure and law.

The Act of 1773 defined the extent of the legislative authority of the Governor-General and Council, and placed it under the supervision and subject to the veto

* See Colebrooke's Supplement to the Digest of Regulations, Vol. III, p. 1.

CHAPTER IV.

of the Supreme Court. No enactments of any importance were passed till 1780, when the Governor-General and Council, considering that important changes had taken place in the constitution and civil government of those provinces since 1772, passed certain regulations* for the more effectual and regular administration of justice in the provincial Civil Courts. Those Regulations were to be considered binding only till a new arrangement should be made by authority of Parliament.†

Later in the same year it confirmed and amended all existing regulations respecting the Sudder and Provincial Courts. And early in 1781 a revised Code was issued.

These must be taken to have been passed in pursuance of the legislative power granted by the Regulating Act. They are not expressed to be registered in the Supreme Court, and probably were not so registered.

But in 1781 the new Act of Parliament (21 Geo. III, c. 70) empowered the Governor-General and Council to frame Regulations for the Provincial Courts, without reference to the Supreme Court. It was under that authority that the Government preferred to act. But they were unable to pass any Regulation which the Supreme Court was in any way bound to recognize, unless it was previously registered as directed by the Act of 1773.

Extent of the first power.

The Supreme Council, therefore, had from the first a two-fold power of legislation conferred by two separate Acts of Parliament. The one enabled them to make

* See Colebrooke's Supplement to the Digest of Regulations, Vol. III, p. 14.

† *Ibid.*, p. 22.

laws for the good order and civil government of the settlement at Fort William and all factories and places subordinate thereto, and to make any Regulations not repugnant to the laws of the realm, and to enforce them by reasonable sanctions; but the exercise of the power was subject to the supervision of the Court. It has been said that the power so conferred was intended to apply only to Calcutta and its dependent factories, into which English law had already been introduced, and not to what are in that Act described as the territorial acquisitions of Bengal, Behar, and Orissa. But the Act does not appear to have been so understood; and the large body of regulation law mentioned above was framed in pursuance of its powers for the benefit of the provinces. 1781—1834.

Extent of the second.

The second power of legislation was derived from the Act of 1781, by which the Governor-General and Council or some committee thereof or appointed thereby was empowered as a Court of Record to determine on appeals or references from the country or Provincial Courts in civil causes; and from time to time to frame Regulations for the Provincial Courts and Councils. Copies of such Regulations were to be transmitted within six months to the Court of Directors and to the Secretary of State, and if not disallowed within two years, they were to be of force and authority to direct the Provincial Courts. Power to disallow or amend such Regulations was reserved to the Sovereign in Council. It was under this Act that, notwithstanding the limited purpose it professed to have in view, most of the Regulation law was passed. The Supreme Court had no power of supervision or of veto in reference to any enactments passed in pursuance of this statute, and in consequence the Council preferred to legislate under its provisions in preference to those of the earlier

CHAPTER IV.

Act. But that Court, on the other hand, was not in terms nor in effect bound by any Regulations which were not duly registered by it.

Registration of laws in the Supreme Court or in any Court of Justice was rendered unnecessary by the Act* of William IV passed in 1833.

Excessive exercise of the powers.

The Regulations passed in pursuance of the authority granted in 1781 were doubtless far in excess of the legislative power, having regard to the precise terms in which it was granted. But after several years of its exercise, Parliament itself† referred to that power as if it were one of making a regular Code affecting the rights, persons, and property of the Natives and others amenable to the Provincial Courts. That was a Parliamentary recognition of the power which the Indian Council had assumed to exercise. The Council, regardless of the limited extent of its legislative authority, had passed numerous Regulations; and in 1793 collected and passed them in the shape of a Revised Code.

Parliamentary recognition thereof.

The Act of Parliament to which I have just alluded was passed in 1797. It recited that various Regulations for the better administration of justice among native inhabitants and others within the Provinces of Bengal, Behar, and Orissa were from time to time framed by the Governor-General in Council in Bengal. It recited, also, that it had been established as essential to the future prosperity of the British territories in Bengal that all Regulations passed by Government affecting the rights, properties, or persons of the subjects should be formed into a regular Code, and printed with translations in the country languages;

---

* 3 & 4 Wm. IV, c. 85, s. 45.
† See 37 Geo. III, c. 142, s. 8.

that the ground of every Regulation should be prefixed to it; and that the Courts of Justice within the Provinces should be bound to regulate their decisions by the rules and ordinances which such Regulations might contain. Parliament referring to these proceedings considered that it was essential that so wise and salutary a provision should be strictly observed, and that it should not be in the power of any Governor-General in Council to neglect or dispense with it for the future. 1781—1834.

Mode of exercising legislative power prescribed.

Accordingly* it was enacted that all the Regulations of that Council affecting the rights, property, or persons of the Natives, or of any other individuals who might be amenable to the Provincial Courts of Justice (thereby recognizing the full extent of the legislative authority which had been assumed and exercised), should be registered in the Judicial Department, and formed into a regular Code, and printed with translations in the country languages, and that the grounds of each Regulation should be prefixed to it. And all the Provincial Courts of Judicature were directed to be bound thereby, and to regulate their decisions accordingly. Copies of the Regulations were directed to be annually transmitted to the Court of Directors and to the Board of Commissioners. By this Act, therefore, the legislative power of the Governor-General, independently of the Supreme Court, was recognized and confirmed, and endeavours were made to place it under control. It was not, however, the first endeavour to place the legislative power in India under some restrictions; for George the First's Charter had reserved to the home authorities a power of supervision. But at this time a formal publication, a written

* See 37 Geo. III, c. 142, s. 8.

CHAPTER IV.

record of reasons for resorting to particular enactments, and official communication of their contents to the authorities in England, were deemed to be necessary expedients for placing a check on any hasty exercise of power.

Legislative power at Madras.

The legislative power being thus firmly planted in Bengal, it next became necessary to establish a similar authority in the other Presidencies. Accordingly, in the year 1800, the Governor* and Council of Fort St. George at Madras were invested within the territories subject to their government with the same legislative power as had previously by any Act been given to the Governor-General and Council of Fort William, that is, they were empowered to frame Regulations for the Provincial Courts and Councils annexed to that Presidency.

At Bombay and Madras.

Again, in 1807, an Act† was passed amongst other things "for the better government of the settlements of Fort St. George and Bombay". It recited the expediency of granting to the two local Governors in Council the same powers of government within their respective territories as were vested in the Governor-General and Council for the government of Fort William. It accordingly empowered them respectively from time to time to make and issue such rules and regulations for the good order and civil government of the towns of Madras and Bombay, and of the Company's settlements at Fort St. George and Bombay, and other factories subordinate thereto, and to add the necessary sanctions as the Governor-General in Council might make for the good order and civil government of Fort William. But it provided that registration

* See 39 & 40 Geo. III, c. 79, s. 11.

† 47 Geo. III, sess. 2, c. 68.

thereof in the Supreme Courts of Fort St. George and Bombay respectively should be necessary to their validity. Such regulations were to be subject to appeal as provided by existing Acts of Parliament.* 1781—1834.

Extent of the power.

As these Acts of 1800 and 1807 were later than the Act of 1797, it might reasonably be considered that the local Governors and Councils had legislative powers conferred on them, not as defined by the Acts of 1773 and 1781, but as recognized and confirmed by the Act of 1797.

It does not appear that the Governor-General exercised any direct authority over the Governors in Council at Madras or Bombay in the matter of making laws. He had control over them in political matters under the Act of 1773, and in revenue matters and all cases whatever under the Act of 1797. A copy of every regulation passed at Madras and Bombay was sent to the Governor-General in Council; but it does not appear that it was submitted for approval before being passed. The legislative powers of the Governor-General's Council were confined by the terms of its constitution and in practice to the Presidency of Bengal.

Extension of legislative authority in 1813.

In 1813 the legislative power so conferred on all three Councils was extended, and at the same time placed under still greater control. The Governor-General and the Governors in Council in their respective Presidencies, with the sanction of the Court of Directors and the Board of Commissioners, were empowered by an Act† passed in that year to impose duties and taxes within the towns of Calcutta, Madras, and Bombay; for the enforcing of which taxes, regulations were

Power of taxation.

* *Vide* 13 Geo. III, c. 63; and 39 & 40 Geo. III, c. 79.

† 53 Geo. III, c. 155, ss. 98, 99 and 100.

Chapter IV.

directed to be made by the Governor-General and Governors in Council in the same manner as other regulations were made.

Jurisdiction of the Legislature

It was also provided in the same Act* that the regulations should apply to all persons who should proceed to the East Indies within the limits of the Company's government.

Regulations to be laid before Parliament

And in addition to the rule which had compelled the Indian Government to forward to the authorities in England copies of all regulations passed, it was then enacted† that copies of legislative regulations, made by the several Governments of India, and required by various Acts of Parliament to be sent Home, should be annually laid before Parliament.

Reservation of Sovereignty of the Crown.

Section 95 of the same Act enacted "that nothing in this Act contained shall extend or be construed to extend to prejudice or affect the undoubted sovereignty of the Crown of the United Kingdom of Great Britain and Ireland in and over the said territorial acquisitions".

Power to make Articles of War.

Then followed two Sections, one of which (Sec. 96) enabled all three Governments to make Articles of War for the order and discipline of the native officers and soldiers in their respective service; and for the administration of justice by Courts Martial to be holden on such officers and soldiers; and for the constitution and manner of proceeding of such Courts Martial.

Customs.

Another Section (98) authorized them, with the sanction of the Home authorities, to impose, within the limits of their respective Presidencies, duties of customs and other taxes in respect of all goods and

* Section 35.
† *Vide* Section 86.

property and on all persons, British-born or foreigners, being therein. 1781—1834.

In addition to those three powers of legislation conferred under the Acts of 1773, 1781, and 1813, a general power of altering the revenue, and of imposing new taxes, had been exercised within the provinces, and is alluded to more than once in Acts of Parliament. But as there is no Act which expressly conferred it, such power has generally been considered to rest on the inherent powers of government; whether derived in succession to the native authority from the grant of the Dewanny, or from those Statutes by which the general power of government or of ordering the revenues had been given or continued to the Company.

Power to alter the revenue and impose new taxes.

Thus from time to time the legislative powers of the Councils were developed; and in pursuance of those powers they enacted laws and regulations till 1834. Down to that date, which is the important epoch in the history of Indian legislation, there were five different bodies of Statute law in force in the empire. *First*, there was the whole body of English Statute law existing in 1726 so far as it was applicable which was introduced by the Charter of George I, and which applied, at least, in the Presidency Towns. *Secondly*, all English Acts subsequent to that date which are expressly extended to any part of India. *Thirdly*, the Regulations of the Governor-General's Council, which commence with the Revised Code of 1793, containing forty-eight regulations, all passed on the same day (which embraced the results of twelve years' antecedent legislation), and were continued down to the year 1834. They only had force in the territories within the Presidency of Bengal. *Fourthly*, the Regulations of the Madras Council, which spread over the period of thirty-two years, viz., from 1802 to

Statute law in 1834.

CHAPTER IV.

1834, and were in force in the Presidency of Fort St. George. *Fifthly*, the Regulations of the Bombay Code, which began with the Revised Code of Mr. Mountstuart Elphinstone in 1827, comprising the results of twenty-eight years' previous legislation, and were also continued till 1834, having force and validity in the Presidency of Fort St. David.

Necessity for reform in the Legislature.

In 1833 the attention of Parliament was directed to three leading vices in the frame of Indian Government. The first was in the nature of the laws and regulations; the second was in the ill-defined authority and power from which these various laws and regulations emanated; and the third was the anomalous and sometimes conflicting Judicatures by which the laws were administered, or in other words the defects were in the laws themselves, in the authority for making them, and in the manner of executing them. The* Judges of the Supreme Court at Calcutta thus expressed themselves in reference to this subject:—"In this state of circumstances, no one can pronounce an opinion, or form a judgment, however sound, upon any disputed right of persons, respecting which doubt and confusion may not be raised by those who may choose to call it in question; for very few of the public or persons in office at home, not even the law officers, can be expected to have so comprehensive and clear a view of the Indian system, as to know readily and familiarly the bearings of each part of it on the rest. There are English Acts of Parliament specially provided for India, and others of which it is doubtful whether they apply to India wholly, or in part, or not at all. There is the English common law and constitution, of

* See Hansard's "Parliamentary Debates" (1833), vol. xviii, p. 729.

which the application is, in many respects, still more obscure and perplexed; Mahomedan law and usage; Hindu law, usage, and scripture; Charters and Letters Patent of the Crown; Regulations of the Governments, some made declaredly under Acts of Parliament, particularly authorizing them, and others which are founded, as some say, on the general power of government entrusted to the Company by Parliament, and, as others assert, on their rights as successors of the old Native Government; some Regulations require registry in the Supreme Court; others do not; some have effect generally throughout India; others are peculiar to one Presidency or one town. There are commissions of the Governments, and Circular Orders from the Nizamut Adawlut and from the Dewanny Adawlut; treaties of the Crown; treaties of the Indian Government; besides inferences drawn at pleasure from the application of the *droit public* and the law of nations of Europe, to a state of circumstances which will justify almost any construction of it, or qualification of its force". 1781—1834.

The Act of William the Fourth.

Accordingly in that year an Act* was passed "for effecting an arrangement with the East India Company and for the better government of Her Majesty's Indian territories till April 30th, 1854". It was enacted in the 43rd section "that the Governor-General in Council should have power to make laws and regulations for repealing, amending, or altering any laws or regulations whatever now in force or hereafter to be in force in the said territories or any part thereof; to make laws and regulations for all persons whether British or Native, foreigners or others, and, for all Courts of Justice, whether established by Her

* 3 & 4 Wm. IV, c. 85.

CHAPTER IV.

Majesty's Charters or otherwise, and the jurisdiction thereof and for all places and things whatsoever within and throughout the whole and every part of the said territories and for all servants of the said Company". The exceptions to this sweeping power were that the Governor-General in Council should not have power to make any laws which should affect any of the provisions of this Act or of the Mutiny Acts, or of any Act thereafter to be passed in anywise affecting the Company, or the said territories, or the inhabitants thereof; nor should it have power to make any laws which should in any way affect any prerogative of the Crown, or the authority of Parliament, or the constitution or rights of the Company, or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, "whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or dominion of the Crown over any part of the said territories".

By a later Act, 16 & 17 Vict., c. 95, s. 26, no law was to be rendered invalid, only because it affected any prerogative of the Crown, provided the previous sanction of the Crown had been obtained.

The following provisions were made in the Act of William IV:—

Provisions relative to legislation.

(1) That the Governor-General in Council should forthwith repeal all laws which should be made by him, but be disallowed by the Court of Directors.

(2) That all his laws should be of the same force and effect within the said territories as an Act of Parliament, and should be taken notice of by all Courts of Justice. Registration in any Court of Justice was declared unnecessary.

(3) The Legislature could not, without the previous sanction of the Court of Directors, authorize any Court of Justice not established by Royal Charter to sentence to death any of His Majesty's natural-born subjects born in Europe, or the children of such subjects. Nor could it abolish any of the Courts of Justice established by Royal Charter. 1781—1834.

An express reservation was made of the right of Parliament to continue to legislate for the Indian territories and their inhabitants; to control, supersede, or prevent all proceedings and acts whatsoever of the Governor-General in Council, and to repeal and alter at any time any law whatsoever made by him. And the better to enable Parliament to exercise such power, the laws of the new Legislature were directed to be laid before both Houses of Parliament in the same manner as those which had been previously made by the several governments in India.

Indian Law Commissioners.

Some subsequent Sections* relate to the establishment of the Indian Law Commissioners.

Local Legislatures superseded.

No power was given in this Act to the Governors in Council of the different Presidencies to make laws, but they were empowered to propose drafts of new laws with the reasons for them to the Governor-General in Council; who was required to take the same into consideration, and to communicate his resolutions thereon to the Government which had proposed them.

Articles of War.

By Section 73, the power to make Articles of War for the Government of the Native officers and soldiers in the military service of the Company and for the administration of justice by Courts Martial, which

* Sections 52, 53, 54 and 55.

CHAPTER IV.

had by the Act of 1813 been distributed over the three Legislatures, was now vested in the Governor-General in Council.

Conclusion.

Thus there was established in India one central legislative authority in place of the three Councils which had before existed. The new Council was armed with authority to pass Laws and Regulations for the whole of the British territories in India. It continued to exist with some changes and modifications till 1861, when it again gave way to the prevalent desire for local Legislative Councils. During that time it passed a considerable number of Acts, some of general application throughout the empire, but the greater portion having a limited and partial operation. Local Legislatures had been tried and superseded by an Imperial Legislature, which in its turn was found inadequate to the political necessities of the country. An attempt was made to increase its usefulness and authority in 1853. But in 1861 a new system was introduced by which local Legislatures were re-established, not to supersede, but to work in harmony with and to a certain extent in subordination to the Legislative Council of the Viceroy. The Supreme Council, however, retains the power of making laws and regulations for the whole of India, as well over those portions which are subject to, as over those which are freed from a local legislative control. The changes which in 1853 were made in the constitution of the Council of 1834, and the character of the new legislative system which was established in 1861, will be described in the next Chapter.

CHAPTER V.

THE LEGISLATIVE COUNCILS—(*Continued*).

Reform of the Council in 1853—Nature of the changes made—Effect thereof—The Legislatures of 1834 and 1853 compared—Advantages of the new system—Assumption of Government by the Crown in 1858 in consequence of the Mutiny and changes incidental thereto—Desire for local Legislatures—Despatch of Lord Canning—His proposal to establish local Legislatures—View of the English Government—The Indian Councils Act, 1861—The Governor-General's Council—Assent to laws—Legislative powers of the Council—Legislative power of the Governor-General—Local Legislatures at Madras and Bombay—Previous sanction of the Governor-General necessary to certain Bills—Power to the Governor-General in Council to establish other local Legislatures—Power of Legislatures so established—Local Legislatures in Bengal and North-West, Punjab and British Burma—Character and functions of the Councils—Act of 1861 amended in 1892.

Reform of the Council in 1853.

THE Legislature established by the Act of 1834 lasted for twenty-seven years; but a considerable change was made in its character and constitution by an Act passed in 1853. The former Act was passed for a period of twenty years, and accordingly fresh legislation became necessary. Though the Council was continued upon the same footing in respect of its being the one legislative authority of India competent to enact laws for the whole of the British territories therein, the new* Act made so many alterations that the system was entirely changed. The principal alteration, which finally led to the re-establishment of local Legislatures, was the introduction of representative members from the sister Presidencies.

---

* 16 & 17 Vict., c. 95—An Act to provide for the government of India.

CHAPTER V.

Nature of the changes made.

It was provided by the new Act passed in 1853* that certain Legislative Councillors should be added to the existing Council; that no law made by the Council should have force or be promulgated until the same had been assented to by the Governor-General whether he had or had not been present in Council at the making thereof; and that no such law should be invalid by reason only that the same affected any prerogative of the Crown, provided the previous sanction of the Crown thereto had been obtained. It authorized Her Majesty to appoint a Commission in England to consider the recommendations and reports of the Indian Law Commissioners.

Effect thereof.

The effect of the new Act was to enlarge the Council, when acting in its legislative capacity, by the addition of new members, called Legislative Members, of whom two were English Judges of the Calcutta Supreme Court, and the others were appointed severally by the local Governments. At the same time the fourth ordinary Councillor, who held under the former Act the corresponding office of Legislative Member, was made a member in the executive branch as well as in the legislative branch. Consequent upon these changes, discussion became oral instead of in writing; bills were referred to select committees instead of a single member; and legislative business was conducted in public instead of in secret. The system so introduced was considered by those who were well versed in it to be an infinite improvement upon the former system.

The Legislatures of 1834 and 1853 compared.

Under the former Act the sole power of making laws in India was vested in the Governor-General of India in Council. That body consisted of the Governor-General and four ordinary members of Council; the

* 16 & 17 Vict., c. 95, s. 22.

Commander-in-Chief, if appointed an extraordinary member of Council, also formed one of the body. Of the four ordinary members it was directed that three should be appointed from persons in the covenanted service of the East India Company, and the fourth from persons who had never been in the service. The duty of the fourth ordinary member was confined entirely to the subject of legislation. He had no power to sit and vote in the Executive Council, but only when meetings were held for the purpose of making laws. It was not necessary that he should be present to form a quorum even at those meetings, although he was particularly charged with the duties of legislation. He * was bound to give his whole time and attention to the work of legislation, but he had no pre-eminent control over it. He was charged with the task of giving shape and connexion to the several laws as they passed, with the labour of collecting local information, and with bringing his legal skill to the assistance of the Council.

1834—1892.

By the Act of 1853 the duties which under the former Act had rested principally on the fourth ordinary member of Council were performed by many. The Governor of each Presidency and the Lieutenant-Governor of each Lieutenant-Governorship were empowered to appoint a Legislative Councillor. The Legislative Councillors so appointed were members of the service of a certain standing, and therefore of knowledge and experience.

Advantages of the new system.

Such a system had many advantages over that which preceded it, even while the Indian Law Commission was in full operation; for the Legislative Councillors had the power which the Law Commissioners

* Consult Minute of Mr. Peacock, dated 3rd November, 1859.

CHAPTER V.

had not of proposing any law which they considered necessary or beneficial, of opposing any law which they deemed unnecessary or injurious, of supporting their opinion by argument in Council, and of voting on every subject which came under discussion. The Legislative Council was not diminished in other respects: for every member of the Executive Council, including the fourth member who obtained the power to sit and vote at all meetings, was also a member of the Legislative Council; it was simply increased by members of practical experience. In addition to the Legislative Councillor, the Chief Justice of Bengal and one of the Puisne Judges of the Supreme Court selected by the Governor-General were also members; and six members in addition to the Governor-General or the Vice-President or Chairman were necessary to form a quorum, and the presence of one of the Judges or of the fourth ordinary member was rendered essential.

Assumption of Government by the Crown in 1858 in consequence of the Mutiny and changes incidental thereto.

It will be seen that apart from giving the fourth or the Law Member the right to sit and vote in the Governor-General's Executive Council, the Act of 1853 was concerned exclusively with the reorganisation, in the manner outlined, of the Legislative Council of the Governor-General. Between 1853 and the enactment in 1861 of the next Parliamentary statute affecting the constitution of the Legislative Authorities in British India, the Indian Mutiny had broken out and been suppressed. One result of this event was the passing of the Government of India Act of 1858* which reconstituted the executive Government itself by removing the East India Company from political and administrative control over the peninsula, and making over all its powers and functions in this behalf and

* 21 and 22 Vict., c. 106.

those of the Court of Directors and the Board of Control 1834—1892.
to a Minister of the Crown designated the Secretary of State for India, who was required in all important matters to act with the concurrence of a Council designated the Council of the Secretary of State for India. This Council was composed in the main of retired officers of the Government of India. The continuity of administration was in all other respects maintained, and one of the express savings of the Act provided that the Government of India should remain subject to action, at the suit of individuals aggrieved, through the Secretary of State in Council in like manner as it hitherto had been through the East India Company. The Secretary of State and the Councillors were not to be personally liable in respect of judgments obtained in such action, and the liabilities resulting from them were to be met out of the revenues and properties of the Government of India held in trust for the Crown. The Goverment of India Act of 1858 was one of the Parliamentary statutes which, the Indian Councils Act of 1861 expressly provided, was not to be affected or altered by Acts of the Indian Legislatures as reconstituted by that Act.

The occurrence of the Mutiny further suggested the expediency of the Government of India taking into its counsel non-officials, both European and Native, with a view to obtaining timely expressions of the feelings and sentiments of the members of the outside public concerning measures proposed to be taken by Government.

Desire for local Legislatures.

Notwithstanding the improvements which it was considered on all hands that the Act of 1853 had introduced, it became necessary to reconsider the whole subject of the establishment and exercise of legislative authority. Madras and Bombay complained

CHAPTER V.

of the enormous preponderance of authority which Bengal through her Council acquired over the sister Presidencies. The wide extent of dominion subject to the legislation of the Council rendered it impossible that all questions could be settled by the light of adequate information and experience. And the internal governance of the Council itself was such that it was rapidly assuming the character, contrary to the intentions of Parliament, of a representative and debating society assembled for the purposes of inquiry into and redress of grievances.

Despatch of Lord Canning.

Lord Canning, in a despatch dated the 9th December, 1859, pointed out what he considered to be the chief faults of the Legislature as it then existed. In the first place it was invested with forms and modes of procedure closely imitating those of the House of Commons. There were 136 standing orders to regulate the proceedings of a dozen gentlemen assembled in Council, which led to delay and confusion. The assumption of the procedure of the House of Commons caused the impression, contrary to the intentions of Government, that reports and returns should be ordered by the Council from the local administrations, that long debates should be held on questions of public interest, and that measures should be introduced independently of the Executive Government.

Lord Canning also expressed his opinion with reference to the constitution of the Council that although a return to the system which existed before 1853 was impossible, it well deserved consideration whether a partial return to the still earlier system which prevailed before 1834 was not advisable. "There is no doubt", he says, "that the introduction of a single member from each local Government has been a great advantage. But although an improvement has been

thus made in the system antecedent to 1853, I do not think it has been carried far enough. I do not think that the principle of representing the Local Governments having been once admitted, the Governments of Madras and Bombay can be reasonably expected to be satisfied with the share which they at present have in any legislation directly concerning their own Presidencies, and I believe that by giving them a much larger share in it, careful local measures may be facilitated and expedited, without leading to any interference with measures of a general character, or with the authority and responsibilities of the Governor-General in Council". 1834—1892.

His proposal to establish local Legislatures.

The Governor-General, after discussing and condemning an alternative suggestion to increase in the existing Council the number of members drawn from the two subordinate Presidencies, proposed that the Council should be broken up into three distinct Councils at Calcutta, Madras, and Bombay.

He proposed not merely that the Governors of Madras and Bombay should each have a Legislative Council, but that Bengal and the North-West Provinces and the Punjab should each have its separate Legislature. He also said that two things were essential in forming a body of advisers to the Governor-General in legislative matters. One that it should be capable of being assembled for business in other places than Calcutta; and the other that it should so conduct its business as that the opinions and votes of Natives not skilled in the English language could be taken. He proposed that all measures of local administration not affecting the revenue should fall within the competency of the local Councils; but that if the matter affected the revenue, the sanction of the Governor-General in Council should be first obtained to the introduction of a bill upon the subject. The making

CHAPTER V.

of laws for those provinces which have no Legislative Councils, that is for non-regulation Provinces, should be vested in the Legislative Council of the Governor-General.

The events which immediately led to the passing of the Indian Councils Act, 1861, were the differences which arose between the Supreme Government and the Government of Madras on the Income Tax Bill; the doubts which had been raised as to the validity of laws introduced into non-regulation Provinces without enactment by the Legislative Council; and the address of the Legislative Council for the communication to it of certain correspondence between the Secretary of State and the Supreme Government of India.

View of the English Government.

Sir Charles Wood, in introducing the Bill into the House of Commons, recapitulated* the objections to the existing institution, which appeared to be quite as strongly felt by the Home authorities as by the Government in India. He complained that, quite contrary to what was intended, the Council had become a sort of debating society or petty parliament. He quoted Sir Lawrence Peel's criticism upon its proceedings, that it "has no jurisdiction in the nature of that of a grand inquest of the nation. Its functions are purely legislative, and are limited even in that respect. It is not an Anglo-Indian House of Commons for the redress of grievances, to refuse supplies, and so forth".

The view which was taken by the English Government of the changes which had become necessary was thus explained: "I propose", said the Secretary of State, "that when the Council meets for the purpose of making laws, the Governor-General should summon.

---

* See Hansard's "Parliamentary Debates", vol. clxiii, p. 639.

in addition to the* ordinary members of the Council, not less than six nor more than twelve additional members, of whom one-half at least shall not hold office under the Government. These additional members may be either Europeans, persons of European extraction, or Natives. Lord Canning strongly recommends that the Council should hold its meetings in different parts of India for the purpose of obtaining at times the assistance of those Native chiefs and nobles whose attendance at Calcutta would be impossible, or irksome to themselves. I do not propose that the Judges *ex officio* shall have seats in the Legislature; but I do not preclude the Governor-General from summoning one of their number if he chooses. The Council of the Governor-General, with these additional members, will have power to pass laws and regulations affecting the whole of India, and will have a supreme and concurrent power with the minor legislative bodies which I propose to establish in the Presidencies and other parts of India ". 1834—1892.

And with respect to giving the power of making laws to the Governors and Councils of other Presidencies he says, " Lord Canning strongly feels that although great benefits have resulted from the introduction of members into his Council who possess a knowledge of localities, the interest of which differs widely in different parts of the country; yet the change has not been sufficient in the first place to overcome the feeling which the other Presidencies entertain against being overridden, as they call it, by the Bengal Council; or, on the other hand, to overcome the disadvantages of having a body legislating for these Presidencies without

* These were increased to five and afterwards to six. See 24 & 25 Vict., c. 67, s. 3; 32 & 33 Vict., c. 97, s. 8; 37 & 38 Vict., c. 91.

CHAPTER V.

acquaintance with local wants and necessities. This must obviously be possessed to a much greater extent by those residing on the spot. And, therefore, I propose to restore, I may say to the Presidencies of Madras and Bombay, the power of passing laws and enactments on local subjects within their own territories; and that the Governor of the Presidency, in the same manner as the Governor-General, when his Council meets to make laws, shall summon a certain number of additional members, to be as before, either European or Native,. and one-half of whom at least shall not be office-holders".

The Indian Councils Act, 1861.

Thus the "Indian Councils Act, 1861,"* was passed in order to consolidate and amend former Acts of Parliament respecting the constitution and functions of the Council of the Governor-General, and to give power to the Governors in Council in Madras and Bombay to make laws for the government of those Presidencies, and to enable the like legislative authority to be constituted in other parts of Her Majesty's Indian dominions.

The Governor-General's Council.

The Governor-General in Council was authorized to appoint the times and places of meeting† of his Legislative Council, and under certain restrictions to make rules for the conduct of its business. The Legislative Council had no power to transact any business other than the consideration and enactment of measures introduced into the Council for the purpose of such enactment. The previous sanction of the Governor-General was necessary before any measure could be introduced into Council affecting (1) the public debt or public revenue of India, or by which any charge could be imposed on such revenue; (2) the religion or

* 24 & 25 Vict. c. 67.

† See also 33 Vict., c. 3, s. 3.

religious rites and usages of any class of Her Majesty's subjects in India; (3) the discipline or maintenance of any part of Her Majesty's military or naval forces; (4) the relation of the Government with foreign princes or states. 1834—1892.

Assent to laws.

The assent of the Governor-General to any law was necessary to its validity, whether or not he had been present in Council at the making thereof. The Governor-General could withhold his assent absolutely, or might reserve the same for the pleasure of Her Majesty thereon; whose assent in that case was necessary, and would be signified through the Secretary of State for India in Council. The Crown also had power to disallow any law which had been assented to by the Governor-General. In that case the law so disallowed would be made void and annulled from the date on which the Governor-General should proclaim or signify to his Council that it had been disallowed.

Legislative powers of the Council.

The legislative powers of the Council extended (1) to repealing, amending or altering any laws or regulations in force in the British territories in India; (2) to making laws for all persons, whether British or Native, foreigners or others, and for all Courts of Justice, and for all places and things within those territories; (3) for all British subjects, whether or not in the service of the Government of India, within the dominions of princes and states in alliance with Her Majesty;* (4) for all Native Indian subjects beyond the Indian territories.† But it was expressly declared that that legislative authority should not extend to repeal or in any way affect any provisions of the Government of India Act of 1858 and of any

* See 28 & 29 Vict., c. 17.
† See 32 & 33 Vict., c. 98.

CHAPTER V.

Act of Parliament passed at any time after the year 1860 or which in anywise should affect Her Majesty's Indian territories or the inhabitants thereof. Nor did it extend to passing any law which might affect the authority of Parliament, or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon might depend in any degree the allegiance of any person to the Crown of the United Kingdom*, or the sovereignty or dominion of the Crown over any part of the said territories.

And in particular the Council had no authority to repeal or affect by their legislation any of the provisions, which at the time of the passing of the Indian Councils Act remained in force, of the Acts† noted below.

---

* The conflicting interpretations placed upon this clause (see *In the matter of Ameer Khan*, 6 Beng. Law Rep. 392, *Bugga* v. *Emperor*, L. R. 47, I. A. 128, and Ghose's Tagore Law Lectures on Comparative Administrative Law, pp. 570–571) have ceased to possess practical interest in view of the language of the amended section in the Government of India Act of 1935, 26 Geo. V, c. 2, which is as follows:

"Sec. 110. Nothing in this Act shall be taken (*a*) to affect the power of Parliament to legislate for British India, or any part thereof; or (*b*) to empower the Federal Legislature, or any Provincial Legislature (*i*) to make any law affecting the Sovereign or the Royal Family, or Succession to the Crown or the sovereignty, dominion or suzerainty of the Crown in any part of India, or the law of British nationality, or the Army Act, the Air Force Act, or the Naval Discipline Act, or the Law of Prize or Prize Courts; or (*ii*) except in so far as is expressly permitted by this Act, to make any law amending any provision of this Act, or any Order in Council made thereunder or any rules made under this Act by the Secretary of State, or by the Governor-General or a Governor in his discretion, or in the exercise of his individual judgment; or (*iii*) except in so far as is expressly permitted by any subsequent provisions of this Act, to make any law derogating from any right of His Majesty to grant special leave to appeal from any Court.

† 3 & 4 Will. IV, c. 85 (but see 32 & 33 Vict., c. 98, s. 3); 16 & 17 Vict., c. 95, 17 & 18 Vict., c. 77, 21 & 22 Vict., c. 106, entitled "an Act for the better government of India", and 22 & 23 Vict., c. 41, passed to amend the same.

1834—1892.

Nor was it to affect any Act enabling the Secretary of State in Council to raise money in the United Kingdom for the Government of India, nor any Act for punishing mutiny and desertion in Her Majesty's Army or in Her Majesty's Indian forces respectively.*

It was provided that no law made by the Governor-General in Council should be deemed invalid by reason only that it affected the prerogative of the Crown. And it was further enacted that the laws and regulations, which had been previously made in respect of any non-regulation province should not be deemed invalid, notwithstanding any doubts which might be entertained whether they had been made in due conformity with or in pursuance of any valid legislative authority.

Legislative power of the Governor-General.

In case of emergency the Governor-General was vested with the authority of his Legislative Council to make and promulgate from time to time ordinances for the peace and good government of the British territories in India or any part thereof. An ordinance, however, so made would only have validity for the space of six months from its promulgation, and might be earlier disallowed by Her Majesty, or controlled or superseded by a law passed by the Legislative Council.

Local Legislatures at Madras and Bombay.

The same Act vested in the Governors of Madras and Bombay power to nominate, in addition to the ordinary members of their Councils, certain persons who should be entitled to sit and vote at meetings thereof held for the purpose of making laws. The power to legislate was vested in the Governor in Council who was authorized to appoint times and places for its meeting, and to make rules for the conduct of its business which, with his assent, might be subsequently amended

* This is subject to the provisions contained in 3 & 4 Will. IV, c. 85, s. 73, respecting the Indian Articles of War.

CHAPTER V.

at meetings of the Council. The assent of the Governor was necessary to the validity of a law, whether or not he was present at the meeting at which it was made. The further assent of the Governor-General was necessary to the validity of such law; in case of such assent being withheld, the Governor-General had to signify to the Governor in writing his reason for withholding it. His assent gave validity to the law, subject nevertheless to its disallowance by Her Majesty through the Secretary of State for India in Council.

The legislative authority, so created in each of the two subordinate Presidencies, extended to repealing and amending any laws made prior to the coming into operation of the Indian Councils Act by any authority in India, so far as they affected such Presidency, but did not extend to legislate, so as in any way to affect the provisions of any Act of Parliament then or thereafter to be enforced in such Presidency.*

Previous sanction of the Governor-General necessary to certain bills.

The previous sanction of the Governor-General was necessary before either of such Councils can take into consideration any law for any of these purposes: (1) affecting the public debt of India, or the custom duties, or any other tax or duty then in force, and imposed by the authority or the Government of India for the general purposes of such government; (2) regulating any of the current coin or the issue of any bills, notes, or other paper currency; (3) regulating the conveyance by the Post Office, or messages by the Electric Telegraph within the Presidency; (4) altering in any way the Penal Code of India as established by Act XLV of 1860; (5) affecting the religion or religious rites and usages of any class of Her Majesty's subjects

---

* For an extension of the power of local Legislatures as regards European British subjects, see 34 & 35 Vict., c. 34.

in India; (6) affecting the discipline or maintenance of any part of her Majesty's Military or Naval Forces; (7) regulating patents or copyright; (8) affecting the relations of the Government with foreign princes or states. 1834—1892.

It was further provided that no law made by any such Governor in Council, and assented to by the Governor-General, was to be deemed invalid only by reason of its relating to any of the purposes comprised in the above list.

Power to the Governor-General in Council to establish other local Legislatures.

No local Legislatures were established in India by the Act, except those at Madras and Bombay. But the Governor-General in Council was empowered to extend by proclamation such provisions of the Act as related to the legislative authority in those two Presidencies, to the Bengal Division of the Presidency of Fort William; and at his discretion to extend those provisions to the North-West Provinces and the Punjab. He was further empowered by proclamation to constitute from time to time new Provinces for the purposes of the Act to which the like provisions should be applicable, and to fix or alter the limits of any Presidency or Province for the purposes of the Act.

Powers of Legislatures so established.

Every Lieutenant-Governor in Council thus constituted was empowered to make laws for the peace and good government of his province or territory. All the provisions contained in the Act which limited the legislative power of the Governors in Council of the two subordinate Presidencies, and which related to the Governor-General's power to declare or withhold his assent to laws made in pursuance of such authority, and which related to the power of Her Majesty to disallow the same, were declared to apply to any laws or regulations which might be made by a Lieutenant-Governor in Council.

CHAPTER V.

The previous assent of the Crown was rendered necessary to give validity to any of the foregoing proclamations which the Governor-General was authorized to make.

The local Legislatures had no power to control or affect by their acts the jurisdiction or procedure of the High Courts. The power of doing so rested with Parliament and the Legislative Council of the Governor-General.*

Local Legislatures in Bengal and North-West, Punjab and British Burma.

The despatch of Sir C. Wood, which accompanied the Act, directed the Governor-General at once to extend the necessary provisions of the Act to the Bengal Division of the Presidency of Fort William.† Accordingly, a proclamation was issued constituting the Bengal Legislative Council on the 17th January, 1862. On the 26th November, 1886, another proclamation was issued constituting a legislative council for the North-West Provinces and Oudh. And on the 9th April, 1897, a third proclamation was issued constituting a legislative council for the territories known as the Punjab. In 1898, a similar council was established for Burma.

The local Legislatures thus established differed from those which existed before the Act of William the Fourth in this important respect, that in former times the regulations of the local Legislatures were complete, and came into operation without reference to the Governor-General; while under the Indian Councils Act,‡ the local Governor would be bound to transmit

* See the Indian High Courts Act, 24 & 25 Vict., c. 104, s. 9, and the 37th Section of the Bengal Charter and corresponding sections in the other Charters.

† Despatch dated 9th August, 1861.

‡ See Section 40.

an authenticated copy of any law to which he had assented to the Governor-General. No local law had any validity till the Governor-General had assented thereto, and such assent should have been signified by him to, and published by, the Governor. If the assent was withheld, the Governor-General was to signify his reason in writing for so doing. 1834—1892.

The Governor-General, therefore, was at the head of all the legislative authority exercised in British India. Besides the legislative authority created by the Indian Councils Act, 1861, the Governor-General in Council was specially empowered by a later Act to pass certain local laws otherwise than at a meeting of his Legislative Council.* This power has been frequently used and many Regulations so made are in force in Upper Burma (originally King Thebaw's dominions), Ajmere, Coorg, Assam and other places.

Character and function of the Councils.

The character of these Legislative Councils was simply this, that they were committees for the purpose of making laws, committees by means of which the Executive Government obtained advice and assistance in their legislation, and the public derived the advantage of full publicity being ensured at every stage of the law-making process. Although the Government enacted the laws through its Council, private legislation being unknown, yet the public had a right to make itself heard and the Executive was bound to defend its legislation. And when the laws were once made the Executive was as much bound by them as the public, and the duty of enforcing them belonged to the Courts of Justice. Such laws were in reality the orders of Government, but they were made in a manner which ensured publicity and discussion, were enforced by the

* See 33 Vict., c. 3.

CHAPTER V.

Courts and not by the Executive, could not be changed but by the same deliberate and public process as that by which they were made, and could be enforced against the Executive or in favour of individuals wherever occasion required.

The Councils were not deliberative bodies with respect to any subject but that of the immediate legislation. They could not inquire into grievances, call for information, or examine the conduct of the Executive. The acts of administration could not be impugned, nor could they be properly defended in such assemblies, except with reference to the particular measure under discussion.

Act of 1861 amended in 1892.

*An Act passed in 1892 amended the Indian Councils Act of 1861. Its chief object was to increase the number of councillors and to authorize discussion of the financial statement of the Government and the asking of questions. The powers of the Provincial Legislatures were extended, with the previous sanction of the Governor-General, to repealing and amending laws made by any authority in India other than the local Legislature concerned, either before or after the passing of the new Act.

---

*55 & 56 Vict., c. 92.

CHAPTER VI.

History of the Reforms of 1909, 1919 and 1935.

Indirect introduction of the elective principle under the Act of 1892 —Additional Members' *rôle*—Antecedent spread of the Indian National Movement and experimentations in Local Self-Government—Origin of the Morley-Minto Reforms of 1909 —Elected non-officials in, and reconstituted *personnel* of the Central and Provincial Legislatures—Powers of criticism of the new Legislatures with no controlling authority over an irremoveable Executive—Report of the Decentralisation Committee of 1909 and its effects in liberalising Local Self-Government—Continued critical attitude of the Public—Failure of the Government of India Bill of 1916—Appointment of the Public Service Commission of 1912 and its Report in favour of increased Indianisation of the Superior Services—Recommendations in that behalf of the Montagu-Chelmsford Report of 1918—Origin of the Montagu-Chelmsford Reform Act of 1919. Preamble of the Act—Nature of the Responsible Government offered by the Montagu-Chelmsford Report—Its reactions upon Indian Political Opinion and the European Services—Insecurity of official tenure in law before 1919—The Departmental Service Rules made Statutory Rules by the Act of 1919—Nature of the "devolution" of authority in the Provinces under the Act of 1919: "Transferred" and "Reserved" Subjects—The Central Government under the Act—Change in budgetary procedure—Power of the Executive to restore refused grants—Powers of the Executive in matters of Legislation—The Constitution of 1919 still unitary, not federal—The Reconstituted Legislatures with Elected Majorities —Events leading to the Appointment of the Simon Commission and to the enactment of the Act of 1935—Rise of Sectional Political Consciousness since the Opening of the Century—The claims of the Indian States and growth of opinion in favour of a Federation of Provinces and States in relation thereto—The Federal Court—Diarchy in the Centre—Heavy personal responsibility of the Governor-General and Governors under the Act—Constitutional Importance of the Instruments of Instruction—Conditions for the establishment of the Federation in the Centre—States' Instruments of Accession—

CHAPTER VI.

Immediate execution of the rest of the Act—Constitution of the Upper Federal Chamber—Constitution of the Lower Federal Chamber—Duration of the Chambers—Functions of the Chambers and the Governor-General's Powers in relation thereto—The "Reserved" Functions of the Governor-General, His "Counsellors", the Advocate-General and Financial Adviser—The Governor-General's Special Responsibilities in the "non-reserved" sphere—Council of Ministers—The Secretary of State for India and his "Advisers"—Provincial Legislatures and their Constitution—Special Responsibilities of the Governors—Ministers in the Provinces and Advocate-Generals—Governor's Powers in relation to Legislation—Provision in case of Failure of the Constitutional Machinery in the Centre and in the Provinces—Divisions of Subjects for Purposes of Legislation between the Central and the Provincial Governments—"Excluded" and "Partially Excluded" areas—Chief Commissionerships—Apportionment of Revenues and Revenue-Resources and the suability of the Federation and the Provinces in their own names—The Federal Court—The High Courts—The Services—Public Service Commissions—Sectional claims to shares in appointments—Charter of Rights of Employees under the Government—The Reserve Bank and the Federal Railway Authority—Immunity from Actions and Proceedings of the Governor-General and Governors—"Subjects' rights" and safeguards against "discriminations"—No constituent powers given to Indian Legislatures—Mode of amendment of certain parts of the Act.

Indirect introduction of the Elective Principle by the Act of 1892. Additional Members' *rôle*.

IT has been seen that one of the objects of the Government of India Act of 1892* was to increase the number of members of the Legislative Councils, and in particular of the non-official members thereof. This object was secured by the Government of India obtaining power, with the sanction of the Secretary of State, to make regulations as to the conditions for the *nomination* of additional members to the Central as well as to the Provincial Legislatures. The regulations actually framed, in terms, authorised the Government to accept recommendations in that behalf made by certain recognised corporate bodies or associations representing particular interests. These bodies and associations

* 55 & 56 Vict., c. 92.

were enabled under cover of these regulations virtually to *elect* their own representatives to the Councils, but so that the official members should always be in a majority. In effect, therefore, the Legislatures retained, as they were intended to do, their original character of advisory councils to the Executive Government in matters of legislation mainly, the Executive Government remaining as before the sole controlling authority in legislation as in every other field of governmental activity. The Government continued to possess the character of the "Monarch in Durbar", willing to lend attention to the views and opinions expressed by representative members of the outside public, in so far as they found expression (1) in the debates and divisions over legislative proposals, (2) at the general discussion which was allowed upon the presentation of the financial statement (at which no votes were taken), and (3) through interpellations, permitted for the first time also by this Act, though within narrowly restricted bounds. **1892—1935.**

Antecedent spread of the Indian National Movement and experimentations in Local Self-Government.

The field of self-government, however, was not left altogether unexplored, for Government had already started experimenting, with the object of fostering what were expected to be real self-governing units, in the municipalities and local boards created by Indian legislation. These, it was hoped, would provide training grounds for the development of a sense of civic responsibility amongst the people of the country, at the same time that they would afford relief to government officials from the burden of detailed supervision over the working of the local authorities. It appears however from the Report of the Decentralisation Committee published in 1909 that neither expectation was substantially fulfilled: in the rural boards, because of failure to develop the principle of

CHAPTER VI.

election and the appointment of official presidents, coupled with inadequacy of financial resources; and (except in the Presidency cities) in the municipalities, whose financial resources were somewhat ampler, owing to excessive financial control joined to the other causes mentioned, which affected them in about the same measure as they affected the rural boards. These experiments, it should be mentioned, synchronised with the growth and spread of the Indian National Movement which had been demanding on behalf of the Indian people wider measures of self-government, in all branches of the administration. The Reform Act of 1892 was in part at least the Government's response to these demands.

Origin of the Morley-Minto Reforms of 1909.

The speeches of non-official members of the Legislative Councils made from towards the end of the last century, writings in Indian newspapers, and speeches and resolutions at meetings of the Indian National Congress gave unequivocal expressions to the growing dissatisfaction of educated Indians at the inadequacy of these reforms. These feelings rose almost to fever pitch upon the termination of the Russo-Japanese War of 1904-1905 in victory for the Asiatic power. Lord Minto, then at the head of the Government of India as Governor-General and Viceroy, was convinced that a substantial move towards increasing the popular element in the administration was necessary to meet the situation, and the Liberal Ministry in power, in which Lord Morley held office as Secretary of State for India, agreeing with him, proposed and carried through Parliament the Government of India Act of 1909, known as the Morley-Minto Act.*

* 9 Edw. VII, c. 4.

The Act of 1909 gave direct approval to the principle of election for the return of representatives to the Councils from recognised corporate bodies, associations, classes and interests, but except in the cases of the newly created landholders', Mohammedans' and (in the Punjab) Sikhs' constituencies, the method of election remained indirect as formerly. The Mohammedan and Sikh constituencies which got the right of sending members by direct election are the earliest instances of what since has attained prominence in Indian politics under the designation of "communal electorates". The Government, relying upon the official majority which it retained in the Central Legislature and the latter's power of concurrent legislation in Provincial matters which was continued in the new Act, decided to face the risk of abandoning the official majority in the Provincial Councils, the Bengal Government even agreeing to accept an elected majority in its Council. The power of nominating some members, as well from non-officials as from officials, was retained. In the net result, there was a substantial increase in the number of members in all the legislatures.

1892—1935.

Elected non-officials in, and reconstituted *personnel* of the Central and Provincial Legislatures.

The Act of 1909 extended the scope of interpellations by allowing members to put supplementary questions. They were given the right also of moving resolutions and dividing thereon upon any matter of public interest, not merely during the consideration of the Annual Financial Statement but at other times as well. The resolutions, however, were to operate only as recommendations which the Government was free to accept or reject. The original conception of the Legislative Councils functioning as committees for purposes of legislation only, thus stood abandoned, and they assumed the character of "grand inquests"

Powers of criticism of the new Legislatures, with no controlling authority over an irremoveable Executive.

CHAPTER VI.

over the administrative acts and policies of Government within their respective spheres, the responsibilities for these remaining, however, as before, in the irremoveable executive Chiefs (the Governor-General, Governor or other Head of Administration) and associated Executive Councillors. In the sphere of legislation, the official majority, the power of concurrent legislation of the Central Legislature, and the vetoes upon legislation resting with the Governors and the Governor-General left the situation practically where it was before the Act. The power of criticism given to the non-official members, which was exercised with admirable restraint in the opening years of the new legislative bodies, tended on the other hand to be increasingly embittered and irresponsible with the passing of years. Such criticism, sanctioned as it was by law, scarcely accorded with the Government's position of the "Monarch in Durbar", which still held in theory.

Report of the Decentralisation Committee of 1909 and its effects in liberalising Local Self-Government.

To the Government as well as to the public in general, the disadvantages of an excessive centralisation of the entire administration had been brought clearly home by the findings of the Decentralisation Committee which were published in 1909. It had recommended relaxation, in several directions, of the control exercised by the Government of India over the Provincial Governments. In the sphere of Local Self-Government, its findings and recommendations led to the promulgation by the Government of India of two resolutions, one in 1915, and a later in 1918, admitting the necessity of a substantial increase in the elective element amongst members of the municipalities and the rural bodies, which, it was announced, should be left free to impose taxes up to the maximum limit fixed by law, be given a free hand in the preparation of budgets, and, except in specified instances, have full

1892—1935.

control over their employees. The municipalities were, as a rule, to have non-official chairmen. The resolutions specially stressed the expediency of setting up village *panchayets*, charged with the duties of attending to village sanitation and village education and vested also with jurisdiction to try petty civil and criminal disputes of local origin. The policy of the resolutions met with warm approval in the Montagu-Chelmsford Report of 1918, which on its part expressed itself in favour of the rural boards also having non-official and preferably elected chairmen. Legislation has since been undertaken in the Provinces to give effect to this policy.*

Continued critical attitude of the Public. Failure of the Government of India Bill of 1916.

Notwithstanding a marked assuagement in its tone and temper which was observed at the outbreak of the Great War in 1914, Indian opinion concerning Government and its measures continued to be keenly and adversely critical between 1909 and the date of the Montagu-Chelmsford Reform proposals which culminated in the passing of the Government of India Act of 1919. In 1916, when the war was still in progress, a proposal in Parliament to amend what the Government of India had been advised was a technical defect in the Parliamentary constitution of British India roused equal opposition from Indians and the European mercantile interests in India and Burma. The Legislatures in India had been accustomed since 1861 to enacting laws taking away in special cases or classes of cases the right of action which the Government of India Act of 1858 had made available to aggrieved individuals against the Government of India, represented since that Act by the Secretary of State in Council, to

* For a more detailed summary, see Ghose, Tagore Law Lectures (1918) on Comparative Administrative Law, pp. 538-544.

CHAPTER VI.

the same extent as such action was formerly admissible against the East India Company. On the ground that in the India Councils Act of 1861 Parliament had expressly withheld power from the Indian Legislatures in any manner to affect the provisions of the Government of India Act of 1858, the Privy Council in 1912 had declared against the validity of all such laws*. The proposal which aimed at neutralising this decision was widely criticised as a retrograde measure calculated to deprive individual subjects of valuable property rights at the option of Government, the passing of any law in the Legislatures of the Government of India resting, as it did, entirely in the uncontrolled will of the Government. The Joint Select Committee of Parliament to which it was referred having reported adversely, the proposal was dropped.†

Appointment of the Public Service Commission of 1912 and its Report in favour of increased Indianisation of the Superior Services.

The practical monopoly hitherto reserved for the European subjects of the Crown in the higher appointments under the Government of India, through the combined operation of the provisions of the Indian Civil Services Act, 1861,‡ and the methods which, since

* See *Secretary of State* v. *Moment*, L. R. 40, I. A. 48.

† Some amendments proposed at the same time, later embodied in Sec. 84 of the Act of 1919 (9 & 10 Geo. V, c. 101), were passed (*vide* 6 & 7 Geo. V, c. 37). Meanwhile, in 1915, the several Parliamentary statutes bearing on the constitution of India had been consolidated into one Act, 5 & 6 Geo. V, c. 61, a step which materially facilitated the consideration of the whole ground covered by the piece-meal legislations of earlier days for the purposes of the Reforms of 1919 and 1935. The new Government of India Act (26 Geo. V, c. 2) permits the Federation of India when established and the Provincial Governments to sue or be sued in their own names in like cases as the Secretary of State in Council might have sued or been sued previously, but subject to any provisions which may be made by the Act of a Federal or a Provincial Legislature (Sec. 176). But such Acts will now have to be passed by a majority of votes in the representative assemblies created by the Act both at the Centre and in the Provinces.

‡ 24 and 25 Vict., c. 54.

the passing of this Act, had come to be adopted for recruitment to these posts, had long formed a subject of keen Indian criticism. Posts in the Indian Civil Service were required by this Act to be filled by means of a competitive examination to be held in England under rules framed by the Secretary of State in Council, and certain specified appointments and all like appointments to be created in future (practically all the "key" posts under the Civil Government) were reserved by it to be held by members of that Service only. Barring a small number of these appointments later thrown open to Indians not belonging to the Service, the situation had undergone no change when, in 1912, Government decided to have the whole position affecting the Imperial as well as the other services under the Civil Government examined by a Royal Commission. **1892—1935.**

The Commission was directed, amongst other matters, to review and report on the limitations which still existed in the employment of non-Europeans and the working of the existing division of the services into "Imperial and Provincial". The Commission's report proceeded on the assumption that British responsibility for India required a preponderating proportion of British officers in the "security services", subject to which they recommended that some services should be entirely recruited in India and that the Indian element in the others should be largely increased.

Recommendations in that behalf of the Montagu-Chelmsford Report of 1918.

The Imperial services, it may be observed, consisted at that date of (1) the Indian Civil Service, (2) the Police, (3) the Forest Service, (4) the Service of Engineers, (5) the (Civil) Medical Service, (6) the Education Service, (7) the Agricultural Service, and (8) the Veterinary Service. The most important offices and practically all offices of responsibility in all the

CHAPTER VI.

departments of the Civil Government fell within these categories and all those appointments were made by the Secretary of State in England under rules framed by him in Council. In pursuance of the recommendations of the Commission (which with modifications were approved in the Montagu-Chelmsford Report) recruitment by the Secretary of State to the Buildings and Roads Branch of the Engineering Service, to the Educational, Agricultural and Veterinary Services ceased from 1924. Meanwhile, in 1918, the Montagu-Chelmsford Report had come to the conclusion that the only practical method of obtaining the proposed increase in the Indian element in these services was to fix a percentage of those appointments, recruitment to which should be made in India. This, and the removal from the regulations of "the few remaining distinctions that were based on race" recommended in the Report, constituted the first serious proposal authoritatively put forward to give approximate practical effect to the provision of Sec. 87 of 3 & 4 William IV, c. 85, that birth, descent, colour, or religion was to be no disqualification for holding office in the service of the Government of India. This provision has ever since kept its place in the successive Parliamentary constitutions of India, being now a part of subsection (1) of Sec. 298 of the Act of 1935.* The language of the provision, it appears from other provisions of the new Act, has been understood as not excluding discrimination *in favour of* members of particular communities, and claims by particular communities to a fair and even a preferential share in certain appointments have been put forward and admitted.

---

* 26 Geo. V, c. 2.

1892—1935.

Origin of the Montagu-Chelmsford Reform Act of 1919. Preamble of the Act.

The stirring up of Indian political imagination, previously alluded to, by the events, amongst others, of the Russo-Japanese War, had led to other untoward consequences, in the shape, namely, of conspiracies against Government and other political crimes, and politically-motived robberies and other offences attended often with violence or threats thereof. On the breaking out in 1914 of the Great War, Government nevertheless met with a surprising measure of friendliness and support from the people of India in general, and the timely assistance the Government in England was enabled to receive from India then and throughout the progress of the War in men, money and resources appeared to the British Government to call for a more generous response to the Indian peoples' desire for self-government and home rule than had hitherto appeared expedient. Accordingly on 20th August, 1917, was made the historic pronouncement in Parliament of the future policy of the British Government to grant responsible government to the Indian people by stages. The substance of this announcement was later embodied in the Preamble of the Reform Act of 1919* in the following terms :—

"Whereas . . . . . . it is the declared policy of Parliament to provide for the increasing association of Indians in every branch of Indian administration, and for the gradual development of self-governing institutions, with a view to the progressive realisation of responsible government in British India as an integral part of the British Empire; and whereas progress in giving effect to this policy can only be achieved by successive stages, and it is expedient that

* 9 & 10 Geo. V, c. 101.

CHAPTER VI.

substantial steps in this direction should now be taken; and whereas the time and manner of each advance can be determined only by Parliament upon whom responsibility lies for the welfare and advancement of the Indian peoples; and whereas the action of Parliament in such matters must be guided by the co-operation received from those on whom new opportunities of service will be conferred and by the extent to which it is found that confidence can be reposed in their sense of responsibility; and whereas, concurrently with the gradual development of self-governing institutions in the Provinces of India, it is expedient to give to those Provinces in Provincial matters the largest measure of independence of the Government of India which is compatible with due discharge by the latter of its own responsibilities, be it therefore enacted. . . . . . "

Nature of the Responsible Government offered by the Montagu-Chelmsford Report.

To give practical effect to the promises of the announcement, the Secretary of State, Mr. Edwin Montagu, was deputed to India to study the situation with the Viceroy on the spot. The Joint Report signed by him and the Viceroy, Lord Chelmsford, now known as the Montagu-Chelmsford Report, which was published in 1918, laid down the lines upon which, on the whole, the Government of India Act of 1919 was shortly afterwards framed and passed through Parliament. The transfer of control over certain departments of the Provincial Governments from the Secretary of State to the Provincial Legislatures acting through ministers chosen from amongst the elected members thereof and holding office at the pleasure of the Legislatures offered itself as the most suitable machinery for giving to the Indian people the first substantial measure of responsible government promised in the announcement.

The scheme of reforms as outlined in the Report, and later embodied in the Act of 1919,* appeared from the very first to have fallen short of the expectations which the announcement in Parliament had raised in India. The members of the European services, on the other hand, were alarmed at the prospects which the announcement held out of their being called upon to serve under masters who themselves would be liable to be swayed by the uncertainties of majority opinion in the Councils. This opinion, it was feared, might even as a rule prove hostile to the European *personnel* in the services. They accordingly made representations to the authorities for security of tenure, pay and pension, and protection from unfair treatment in matters of transfer and reduction. Also, in view of the recommendations of the Public Services Commission favouring a substantial increase of the Indian element in the Imperial services, which they submitted would proportionately reduce their expectations of promotion to the highest appointments, they claimed that option should be allowed to them to retire, if so advised, upon proportionate pension, and compensations.

1892—1935.

Its Reactions upon Indian Political Opinion and the European Services.

To appreciate the attitude taken up by the services, it is necessary to bear in mind that in law all servants under the Crown hold office at its pleasure, and a Government servant has no remedy in law against wrongful dismissal or reduction or against any form of unjust treatment whatever by his employer. No suit lies against the employer, when the employer is the Government, for arrears of pay earned or even pension which has fallen due. Statute 3 & 4 William IV, c. 85, appears to have made these rules of common

Insecurity of official tenure in law before 1919.

* 9 & 10 Geo. V, c. 101.

CHAPTER VI.

law applicable to persons holding public appointments under the East India Company, and the same conditions continued to govern official relationship in India after the assumption of Government by the Crown.*

The Departmental Service Rules made statutory rules by the Act of 1919.

It is true, there were departmental rules which were habitually observed and which in fact and practice assured to Government servants of all ranks in India security of tenure and privileges and prospects which not only left no grounds for complaint but actually made service under Government eminently attractive in contrast with service under other employers. But exceptional cases would occur and when such cases came up before Courts of law, the rules were treated as being no better than domestic regulations with no obligatory force in law.†

Representations made by the European services to the Viceroy and Mr. Montagu resulted in these departmental rules being converted by Sec. 96 B of the Government of India Act of 1919‡ into statutory ones. This and other provisions made by the Section created a quasi-legal tenure of office for all holders of appointments under the Civil Government of India. In particular, and without prejudice to rights of redress given by the rulės, persons appointed by the Secretary of State in Council who might consider themselves wronged by an order of an official superior in a Governor's province were given a statutory right, upon failure to obtain redress by representation made to such official superior, to complain direct to the

* See Ghose, Tagore Law Lectures (1918) on Comparative Administrative Law, pp. 449-451, 454-457, 465-466.

† *Shenton* v. *Smith* (1895) A. C. 229 ; *Ram Das Hazra* v. *Secretary of State*, 18. C. W. N. 106 ; Ghose, Tagore Law Lectures (1918) on Comparative Administrative Law, pp. 457-458.

‡ 9 & 10 Geo. V, c. 101.

Governor who was laid by the Section under a statutory obligation to examine the complaint and take such action thereon as might appear to him just and equitable. Persons appointed by the Secretary of State in Council before the commencement of the Act obtained the statutory assurance that they would retain all their existing and accruing rights (meaning expectations) or shall receive such compensations for the loss of any of them as the Secretary of State in Council might consider just and equitable. A Commission (the Lee Commission) was subsequently appointed to advise the Secretary of State on the manner in which the Secretary of State in Council should act for implementing these assurances. The Commission's recommendations in that behalf were substantially approved and given effect to. **1892—1935.**

Nature of the "devolution" of authority in the Provinces under the Act of 1919: "Transferred" and "Reserved" subjects.

In regard to the constitution of the Government itself, the Joint Report felt constrained to recommend the trial of experiments in the direction of responsible Government in a more or less contracted field in the first instance, and that in the Provincial administrations only. The Secretary of State and the Viceroy had been convinced that the existing constitution, of which the fundamental feature was an irremoveable executive and a body of elected representatives in the Council with illimitable opportunities for criticism and comment but no corresponding obligation on their part to shoulder the responsibilities of actual administration, had been stretched and extended to the breaking point, and the only alternative courses open to Government to avoid an *impasse* were either to revert to the undiluted autocracy of older days or turn the ship of the State in the direction of responsible government through ministers responsible to representative legislatures. But, apart even from these considerations,

CHAPTER VI.

they were convinced further that the existing administration was centralised beyond actual requirements, so as even to cripple and paralyse local initiative and local action in many possible desirable directions. They therefore proposed a scheme which would simultaneously involve decentralisation of the departments to be "transferred" to the control of the Provincial Legislatures, and devolution (or deconcentration) of authority in the remaining departments of the Provincial administrations (called the "reserved" subjects) which would continue to be administered by the Governors with their Executive Councillors, but without the interference of former days by an accountability, in matters of detail, to the Central Government. The "transferred subjects" given over to be controlled by the Provincial Legislatures through "Ministers" varied in detail from Province to Province but in general embraced such subjects as local self-government, sanitation, education and public works. Power was reserved however in the Governors to override their Ministers and issue orders on their own responsibility whenever this might be deemed advisable and power even to administer any or all of these subjects in person for as long as might be found necessary. The "reserved subjects" were not excluded from the cognisance of the Legislatures, but their functions in relation to them remained as before advisory, and the legal power to control and supervise the administration of these subjects remained as formerly in the Central Government and through it in the hands of the Secretary of State in Council.

The Central Government under the Act.

No part of the Central Government was made responsible, and it remained as formerly in law under the direction and control of the Secretary of State or the Secretary of State in Council, the Central Legislature

functioning as formerly in relation to the administration in the centre as an advisory body only. 1892—1935.

An important procedural change in regard to budgets was introduced in both the Central and the Provincial Legislatures. Excepting items which were declared to be non-votable, all proposals for appropriation of moneys and revenues in any year were required to be submitted to them in the form of demands for grants to the Lower House in the Central Legislature (which was made bi-cameral) and to the Legislative Councils in the Provinces; and any non-votable item was also liable to similar treatment at the option of the Governor-General or Governor. But any grant refused or reduced might be restored wholly, as regards central and reserved subjects, and to the extent found necessary to carry on the administration, in regard to transferred subjects, by the Governor-General or Governor, who were further given power to sanction special expenditures in emergencies, on their own responsibility.

Change in budgetary procedure. Power of the Executive to restore refused grants.

In matters of Legislation the existing vetoes were retained, but in addition the Governor-General and the Governors received power to require the legislatures to refrain from considering or further pursuing any measure before them. Power was also given to them to "certify", in respect of any proposal for legislation relating to a central or reserved subject thrown out by the Legislatures, that the same was necessary in the public interest, and place it on the Statute book on their own responsibility.

Powers of the Executive in matters of Legislation.

The creation of partially responsible governments in the Provinces was not intended to convert the previously highly centralised Government into a federal one. The division of subjects into "central"

The Constitution of 1919 still unitary and not federal.

CHAPTER VI.

and "provincial" and the latter into "reserved" and "transferred subjects" was by no means rigid for purposes either of administration or legislation. On doubts arising as to whether a particular matter fell within the one or the other authority, the decision of the Governor-General or the Governor concerned, as the case might be, was made final. The validity of no Act of the Central or a Provincial Legislature was open to question in a Court of law on the ground of usurpation of jurisdiction belonging to one by the other. Though the Governors were expressly enjoined by rule not to "certify" a legislative proposal thrown out by the Legislature if it concerned a transferred subject, once such proposal had been so certified and made into a "Governor's Act", its validity ceased to be open to challenge on that ground in any Court of law.

The reconstituted Legislatures with elected majorities.

Besides that the Central Legislature was, as stated, made bi-cameral, the composition of both the Central and Provincial Legislatures underwent substantial modifications. The elected members came to be in a substantial majority in all the Provincial Legislatures and in both Houses of the Central Legislature. The method of election was made direct in every case by constituencies which were delimited or determined under Rules framed under the Act. The communal Sikh and Mohammedan constituencies as also the landholders' constituencies remained integral parts of the constitution under the Act of 1919. Some power of "nominating" members was retained. Indian legislators, both elected and nominated, received "members' privileges" for the first time under this Act [Secs. 67 (7) and 72D (7)]. The details of the composition of the Legislatures are no longer of any practical or historical interest.

1892—1935.

Events leading to the appointment of the Simon Commission and to the enactment of the Act of 1935.

As already stated, the Act of 1919 met with even less favourable reception from the Indian public than the previous Act of 1909, and demands were put forward for a drastic revision of the Act long before the ten years' trial period fixed by the Act itself had expired. Government's refusal to accede immediately to the demand led to the inauguration of the "Non-co-operation" and later of the "Civil Disobedience Movement". These movements coincided also with a recrudescence of terroristic crimes in different parts of the country and several outbreaks of communal clashes between Hindus and Moslems. The Statutory Commission promised by Sec. 84A of the Act was finally, under special Parliamentary authorisation*, appointed by Royal Warrant in 1927. It consisted of seven members of Parliament with Sir John Simon as President (hence known as the Simon Commission). The Commission visited different parts of India, and its report, one of the main features of which was condemnation of diarchy as it had been brought into operation in the Provinces under the provisions of the Act of 1919, was discussed at a Round Table Conference in England in which representative men from India, including Mr. M. K. Gandhi, the leader of the Civil Disobedience Movement and spokesman for the Indian National Congress, participated. At the end of these discussions the proposals of Government, as embodied in a White Paper, were considered by a Joint Select Committee of the two Houses of Parliament. The Government of India Act of 1935† and the Government of Burma Act of 1935,‡ first passed as a single Act, by 25 & 26

breaking out again

* Government of India Statutory Commission Act (17 & 18 Geo. V, c. 24).

† 26 Geo. V, c. 2.

‡ 26 Geo. V, c. 3.

CHAPTER VI.

Geo. V, c. 42, but later made into two distinct self-contained enactments, for convenience of reference, by the Government of India (Reprinting) Act, 26 Geo. V, c. 1, are based mainly upon the recommendations of this Committee, amended in details during passage through Parliament.

Rise of Sectional Political Consciousness from the opening of the Century.

The political history of India from after the opening of the present century is specially marked by a gradual spread and progressive intensification of political consciousness amongst classes and sections hitherto practically politically unconscious, and the development along with it of class and communal consciousness. At the opening of the century, the contestants for the responsibilities and profits of power were the European services led by the Indian Civil Service and the Indian intelligentsia, as yet unconscious of any serious internal differences in their political outlooks. Before the inauguration of the Morley-Minto Reforms, the Mohammedans' and the Sikhs' and the Landholding interest had already stood out from the rest of the Indian community for what they regarded as their special "minority" interests. The European services themselves, as already seen, became acutely self-conscious of their special claims and vested and accruing interests as soon as, in 1917, the question of conceding a measure of responsible government to Indians in the Provinces came to be mooted. In 1927, the Simon Commission found itself confronted by claims for special consideration by other "minority" interests, Anglo-Indians (those who were formerly styled "Eurasians"), Native Christians, "Depressed" Hindus, and other "Backward" classes, the European Commercial interests, Labour and even Women. Each and all of them came forward with special claims and demands for safeguards. Local patriotism too which

had been taking on a progressively accentuated form found expression in such particularistic claims as "Bihar for the Biharees", "Burma for the Burmans", and demands were put forward and substantiated for the constitution of a special Oriya-speaking Province and the complete separation from Bombay of Sind. "Minority interests" had already acquired such sacrosanctity in the post-War European outlook, that it is not surprising that in these circumstances the Government both in England and in India were repeatedly drawn into giving assurances of their resolve to secure all "minorities" in India in the enjoyment and exercise of their legitimate minority rights and to safeguard special interests from discriminatory or penal treatment. 1892—1935.

The claims of the Indian States, and the growth of opinion in favour of a Federation of Provinces and States in relation thereto.

One and a most important special interest though dimly visualised already in the Simon Report came into prominence, and for a time even overshadowed the others, after the publication of the Simon Report. There was singular unanimity amongst all parties and interests in England and India that there should no longer be a diarchy, but complete autonomy in the Provinces. The Simon Commission had also recommended this but was equally unequivocal in its opinion against the introduction of any element of responsibility in the Central Legislature. But the conferment of Provincial autonomy unaccompanied by any measure of responsibility at the Centre appeared later to be fraught with possibilities of friction and even disruption. At the same time, no scheme of responsibility at the Centre offered itself unless the Indian States could be induced to participate in it; for the Crown, it was realised, could not transfer its responsibilities to these States to a Legislature composed of members elected from Constituencies in British India alone. This

CHAPTER VI.

meant that the responsible Government at the Centre had to be a Federation with the British Indian Provinces and the States for units. This is the view that was put forward in the White Paper, accepted by the Joint Select Committee, and finally embodied in the Bill which, after amendment in the Houses of Parliament, became the Act of 1935.*

The Parliament, it was further realised, had not the same authority over the States that it had over the British Indian Provinces. It followed that "the range of authority conferred upon the Federal Government and Legislature in relation to the States have to be determined by agreement with their Rulers". The States themselves made it plain that they were not prepared to transfer to the Federal Government the same range of authority in their territories as might be expedient or possible to confer in relation to the Provinces. The States were thus enabled to come forward not only as the strongest claimants for special discriminatory treatment, but also with a power for individual bargaining which did not belong to any other interest.

The Federal Court.

The proposal to establish a Federal Court which is an integral part of the new Act followed as a corollary from the proposal to establish an All-India Federation of this complexion.

Diarchy in the Centre.

In determining the details of the Federal Constitution, the sponsors of the new measures, it will be seen, felt constrained, by circumstances again, to institute in the Central Government the very diarchy which had been condemned and excluded from the Provinces.

---

* 25 & 26 Geo. V, c. 42, later passed as two distinct Statutes 26 Geo. V, c. 2, for India, and 26 Geo. V, c. 3, for Burma.

1892—1935.

In the result, apart from the central subjects which have been "reserved" and thus continue to be under the control of the British Government and Parliament, the large discretionary powers which the old Act had retained in the hands of the Governor-General and the Governors for exercise in emergencies and for safeguarding the rights and privileges, so far, of the European members of the services had not only to be kept intact but extended in many other directions. The drafting of the Instruments of Instruction which are to guide these high officials in the exercise of these special powers and responsibilities have quite naturally thus come to assume unprecedented importance in the new constitution. A draft of any Instrument of Instruction is required by the new Act to be laid before Parliament and no proceeding can be taken upon it except in pursuance of an Address presented to His Majesty by both Houses of Parliament praying that the Instrument may be issued, though the validity of anything done by the Governor-General or a Governor will not be open to question on the ground that it is not in conformity with the Instrument of Instruction (Secs. 13 and 53).*

Heavy personal responsibilities of the Governor-General and Governor under the Act. The Constitutional importance of the Instruments of Instruction.

The purpose of the Act, to state more precisely, is to set up in place of the hitherto centralised and unitary Government a Federation linking together eleven British Indian Provinces (including the new Provinces of Orissa and Sind, but not Burma which is excluded from the Federation and is given a unitary constitution, but modelled in other respects upon the Indian Constitution) and such Indian States as may be prepared to join, provided that the Federation is not to come into operation until accession to it has been obtained

Conditions for the establishment of the Federation in the Centre. States' Instruments of Accession.

Immediate execution of the rest of the Act.

* 26 Geo. V, c. 2.

CHAPTER VI.

from Indian States representing not less than half the total States' population, and so again that the Rulers thereof shall be entitled to choose not less than 52 members of the Council of State (the Upper Federal Chamber) according to the scheme laid down in Part II of Schedule I of the Act (Sec. 5). Till this condition is fulfilled, provision has been made for the Central Government to continue functioning as under the old Act. But the application of the Act to the Provinces is not to await this event, and the Federal Court, the Federal Public Services Commission and the Federal Railway Authority (amongst the Federal Institutions created by the Act) are to come into existence from the beginning and function in those names so far as concerns British India in the manner prescribed by the Act (Secs. 318, 320). It is expected that all the States will accede, but accession has necessarily to be left to the voluntary choice of each State and each such act of Accession will be by an Instrument of Accession to which the Ruler of the acceding State will have signified his acceptance. The Ruler of an acceding State has the right in the first instance to select the matters in respect of which he is prepared to accept the authority of the Federation and fulfil his obligations thereunder, but His Majesty is not required to accept any Instrument of Accession or a Supplementary Instrument varying it, if the terms proposed appear to him to be inconsistent with the scheme of Federation embodied in the Act (Sec. 6). The Second Schedule of the Act specifies the provisions of the Act which may be amended by or by the authority of Parliament without affecting an act of Accession, but such amendments are not to affect the position of the acceding State as under the Instrument of Accession unless the same are accepted by a Supplementary Instrument

(Sec. 6). Provision has been made in Part II of Schedule I for dealing with shortages in the numbers of the States' representatives in the Chambers of the Federal Legislature after the Federation has been established, owing to non-accession of States. 1892—1935.

Constitution of the Upper Federal Chamber.

The Federal Legislature is to be two-chambered. The Upper Chamber, the Council of State, is to consist of 156 representatives of British India and not more than 104 representatives of States (Sec. 18). Except where a single seat is allotted to a group of States, the representatives of the States will be nominees of the individual Rulers thereof. The British Indian representatives are to be returned by direct election by territorial constituencies for the general seats and the Sikh and Mohammedan seats as shown in the Table of Seats annexed to Part I of Schedule I of the Act. Those belonging to these special constituencies cannot vote in the general constituencies. Representatives for seats allotted in the Table to members of the Scheduled Castes, Anglo-Indians, Europeans, the Indian Christian Community and to Women are to be returned by Electoral Colleges of one kind or another.* Six seats are reserved for filling by nomination. The Table of Seats which is reproduced below will show the distribution of the seats, Province by Province and amongst the several constituencies.

* The Electoral Colleges to choose representatives of the Scheduled Castes will be members of those castes who have been holding seats in the Chamber or Chambers of the respective Provincial Legislatures. The Electoral Colleges for the Anglo-Indian, European and Indian Christian seats shall consist of members of the Chamber or both Chambers of the Legislatures of the respective Governors' Provinces, belonging to those communities. Men and women holding seats in the Chamber or either Chamber of a Provincial Legislature shall be the Electoral College to elect to Women's seats reserved for that Province.

CHAPTER VI.

TABLE OF SEATS.

The Council of State.
Representatives of British India.
Allocation of seats.

1. Province or Community.	2. Total seats.	3. General seats.	4. Seats for Scheduled Castes.	5. Sikh seats.	6. Moham-medan seats.	7. Women's seats.
Madras . .	20	14	1	..	4	1
Bombay . .	16	10	1	..	4	1
Bengal . .	20	8	1	..	10	1
United Provinces	20	11	1	..	7	1
Punjab . .	16	3	..	4	8	1
Bihar . .	16	10	1	..	4	1
Central Provinces and Berar.	8	6	1	..	1	..
Assam . .	5	3	..	..	2	..
North-West Frontier Province.	5	1	..	..	4	..
Orissa . .	5	4	..	..	1	..
Sind . .	5	2	..	..	3	..
British Baluchistan.	1	..	..	..	1	..
Delhi . .	1	1	..	..	..	..
Ajmer-Merwara	1	1	..	..	..	..
Coorg . .	1	1	..	..	..	..
Anglo-Indians .	1	..	..	..	..	..
Europeans .	7	..	..	..	..	..
Indian Christians	2	..	..	..	..	..
Totals .	150	75	6	4	49	6

Constitution of the Lower Federal Chamber.

The Federal Assembly (the Lower House) will consist of 250 representatives of British India and not more than 125 representatives of the Indian States, the latter being, as in the Council of State, nominees of

the Rulers of the States (Sec. 18). The British Indian representatives to the Assembly will be returned by one kind or another of indirect election. For electing to the seats allotted to the general, Sikh and Mohammedan constituencies, the members of the Provincial Legislatures for those constituencies will be the Electoral Colleges, voting in case of a general election in accordance with the principle of proportional representation by means of the single transferable vote. Other kinds of Electoral Colleges have been constituted for filling the Anglo-Indian, European, Indian Christian and Women's seats.* For seats in the general constituencies reserved for the Scheduled Castes, the representatives are to be elected by the Electoral Colleges for those constituencies out of members, four for each seat, to be elected by primary electorates consisting of successful candidates for primary elections held for the election to seats reserved for those castes in the Provincial Legislatures. It should be remarked that the holders of Sikh seats in the North-West Frontier Province and the holders of seats reserved for representatives of backward areas or backward tribes in any Province are to be deemed to hold general seats. Special provisions have been made for election to the seats reserved for representatives of Commerce and Industry, and Labour. Specially constituted territorial constituencies will elect to seats reserved for landholders. The following Table of Seats annexed to Part I of Schedule I of the Act will show the allotment and distribution of seats, Province by Province and according to constituencies. 1892—1935.

---

* For these seats single Electoral Colleges have been constituted consisting respectively of persons holding Anglo-Indian, European, Indian Christian and Women's seats in the Legislative Assemblies of the Governors' Provinces.

CHAPTER VI.

TABLE OF SEATS.—*The Federal Assembly.*

Representatives of British India.

1.	2.	3.	4.	5.	6.	7.	8.	9.	10.	11.	12.	13.
		GENERAL SEATS :—										
Province.	Total Seats.	Total of General Seats.	General seats reserved for Scheduled castes.	Sikh Seats.	Moham-medan Seats.	Anglo-Indian Seats.	European Seats.	Indian Christian Seats.	Seats for representatives of commerce and industry.	Land-holders' Seats.	Seats for representatives of labour.	Women's Seats.
Madras	37	19	4	..	8	1	1	2	2	1	1	2
Bombay	30	13	2	..	6	1	1	1	3	1	2	2
Bengal	37	10	3	..	17	1	1	1	3	1	2	1
United Provinces . .	37	19	3	..	12	1	1	1	..	1	1	1
Punjab	30	6	1	6	14	..	1	1	..	1	..	1
Bihar	30	16	2	..	9	..	1	1	..	1	1	1
Central Provinces and Berar .	15	9	2	..	3	..	..	..	..	1	1	1
Assam	10	4	1	..	3	..	1	1	..	..	1	..
North-West Frontier Province.	5	1	..	..	4	..	..	..	..	..	..	..
Orissa	5	4	1	..	1	..	..	..	..	..	..	..
Sind	5	1	..	..	3	..	1	..	..	..	..	..
British Baluchistan . .	1	..	..	..	1	..	..	..	..	..	..	..
Delhi	2	1	..	..	1	..	..	..	..	..	..	..
Ajmer-Merwara . . .	1	1	..	..	..	..	..	..	..	..	..	..
Coorg	1	1	..	..	..	..	..	..	..	..	..	..
Non-Provincial Seats . .	4	..	..	..	..	..	..	..	3	..	1	..
Totals . .	250	105	19	6	82	4	8	8	11	7	10	9

The Council of State shall be a permanent body not subject to dissolution. Disregarding transitional provisions, the members will be appointed for nine years, one-third of the members retiring every third year. The Assembly unless sooner dissolved is to have a life of five years. 1892—1935. Duration of the Chambers.

The Council of State is virtually given co-ordinate authority with the Assembly in all matters, financial and legislative, and provision is made for joint sittings of the Chambers in cases of difference. Expenditures other than those specifically charged on the revenues of the Federation are required to be submitted to the vote of the Federal Legislature, but this exception is not intended to prevent discussion in either Chamber of non-votable expenditures, save and except the salary and allowances of the Governor-General and other expenditures relating to his office for which provision is required to be made by Order in Council, and sums made payable out of the revenues of the Federation in respect of expenses incurred in discharging the functions of the Crown in its relation with the Indian States (Secs. 33, 34). Functions of the Chambers and the Governor-General's powers in relation thereto.

The Governor-General is given power to restore grants refused or reduced if the refusal or reduction should appear to him to affect the discharge of any of his "special responsibilities" (Sec. 35).

The Governor-General's power of vetoing and reserving Bills and of returning them for reconsideration remains as before, as also his power to issue Ordinances, in cases of emergency, to remain in operation for a period up to six months in the first instance, but capable of extension in the same manner up to another such maximum period. In addition he is authorised to issue Ordinances during recess of the Legislature, which will lapse after six weeks from the reassembling

CHAPTER VI.

of the Legislature, unless the same should have been disapproved by the Legislature in the meantime. Under the new Act, as under the old, the Governor-General can prohibit discussion of any measure in the Chambers, in the interest of public peace and tranquillity. In the event of the Chambers or either of them throwing out a legislative proposal which the Governor-General deems essential for the purpose of discharging his discretionary responsibilities, he may after due notification of his intention to the Chambers enact the measure on his own responsibility as a " Governor-General's Act ". He may also arrange for joint sittings of the Chambers (Secs. 31, 32, 40, 42—44). The Crown's power of disallowance of each of these several varieties of legislation remains as before (Sec. 32).

The provisions of the Act of 1919 which required several varieties of legislative proposal to obtain the previous sanction of the Governor-General have, in view of the special responsibilities (to be presently mentioned) reserved to the Governor-General in the Act, received considerable extensions. These and similar powers conferred by the Act on the Governors in the Provinces will be found enumerated or alluded to in Sec. 108 of the Act. But absence of previous sanction is not to render a measure if passed invalid if subsequent assent has been obtained of the Governor-General or the Governor as the case may be or of His Majesty (Sec. 109).

The " Reserved Functions " of the Governor-General, His " Counsellors ", the Advocate-General and Financial Adviser.

Four functions, namely, in relation to (1) Defence, (2) Ecclesiastical affairs, (3) External affairs except the relations between the Federation and any part of His Majesty's Dominion, and (4) the Governor-General's functions in or in relation to the Tribal Areas, are reserved for administration by the Governor-General in his discretion, wherein he is to be assisted by " Counsellors " not exceeding three in number, who

will have the right to address either Chamber, but without the right to vote unless otherwise entitled. A similar right is reserved for the Advocate-General of the Federation to be appointed by the Governor-General. The Governor-General is also to have a Financial Adviser who has not this right (Secs. 11, 15, 16, 21). 1892—1935.

Governor-General's special responsibilities in the non-reserved sphere.

In relation to the remaining Federal subjects, the Governor-General is charged with the following special responsibilities, namely, for

(*a*) The prevention of grave menace to the peace or tranquillity of India or any part thereof.

(*b*) Safeguarding the financial stability and credit of the Federal Government.

(*c*) Safeguarding the legitimate interests of minorities.

(*d*) Securing to persons who are or have been members of the public services and to their dependents rights guaranteed to them by or under the Act and safeguarding their legitimate interests.

(*e*) Securing in the sphere of executive action the fulfilment of the purposes reserved in the Governor-General's discretion in the legislative sphere.

(*f*) The prevention of discriminatory or penal treatment of goods imported into India of United Kingdom or Burmese origin.

(*g*) The protection of the rights of any Indian State and the rights and dignity of the Rulers thereof.

(*h*) Securing the due and unimpeded discharge of functions with respect to other matters

CHAPTER VI.

which have been left by the Act in the Governor-General's discretion or to the exercise of his individual judgment (Sec. 12).

Council of Ministers.

Subject to the free exercise by the Governor-General of his individual judgment and discretion in all the above matters, the administration of Federal Affairs will be in the hands of a Council of Ministers, not exceeding ten in number, responsible to the Federal Legislature. The Ministers should be or should have to be elected members of either Chamber and will have the right to address both Chambers but not to vote in the Chamber to which they have not been elected (Secs. 9, 19, 21).

The Secretary of State for India and his "Advisers".

Subject to his Instrument of Instruction, the Governor-General remains under the direction and control of the Secretary of State only in so far as by this Act he is required to act in his discretion or to exercise his individual judgment (Sec. 14). The Secretary of State is, under the Act, to have a body of "Advisers", not less than three and not more than six in number, whose duty (except in matters in which their concurrence is required under the Act) will be to advise him on any matter in which the Secretary of State may desire their advice (Sec. 278).

Provincial Legislatures and their Constitution.

Diarchy having been definitely abrogated in the Provinces, the governments there, subject again to the special powers and responsibilities reserved in the Governor and other specified restrictions, are to be entrusted to Ministers responsible to the respective Legislatures. These should be or should have to be elected members thereof. The Legislatures are to be bi-cameral in the Provinces of Madras, Bombay, Bengal, the United Provinces, Bihar and Assam, and single-chambered in the others. The Upper Chambers in the

former, designated the Legislative Councils, are to be permanent bodies, the members whereof are (apart from transitional provisions) to hold office for nine years, a third of the number retiring at the end of every three years. The lower Houses in them or the single chamber in the one-chambered Legislatures (designated the Legislative Assemblies) will unless sooner dissolved have a life of five years (Secs. 60, 61). 1892—1935.

Disregarding differences in detail the representatives for the general and special constituencies and of women are to be elected by territorial constituencies. The Table of Seats annexed to the Fifth Schedule of the Act, given below, will give an idea of the composition of these Legislatures in the several Provinces.

The method by which representatives of the Scheduled Castes are to be returned by the general constituencies is to require the members of the castes in the constituencies to elect four members of their own castes for each seat reserved, at a primary election, the general constituencies' selection of representatives being confined to these. This will not preclude a member of any such caste from standing for an unreserved seat, in the absence of specific provision in that behalf made in respect of any particular Province. Special provisions have been made for filling the seats allotted for representation of Backward Areas and Tribes, Commerce, Industry, the Mining and Planting, and the Landholding interests, the Universities and Labour, in the Legislative Assemblies of the Provinces. In Bihar, the Indian Christian seat in the Assembly is also dealt with in a similar manner. In the Province of Bombay, seats have been reserved for representatives of the Marathas in the general constituencies in a similar manner to the seats reserved for the Scheduled Castes.

TABLE OF SEATS.—*Provincial Legislative Assemblies.*

1.	2.	3.	4.	5.	6.	7.	8.	9.	10.	11.	12.	13.	14.	15.	16.	17.	18.	19.
		GENERAL SEATS.												SEATS FOR WOMEN.				
Province.	Total Seats.	Total of General Seats.	General Seats reserved for Scheduled Castes.	Seats for representatives of backward areas and tribes.	Sikh Seats.	Mohammedan Seats.	Anglo-Indian Seats.	European Seats.	Indian Christian Seats.	Seats for representatives of commerce, industry, mining and planting.	Landholders' Seats.	University Seats.	Seats for representatives of labour.	General.	Sikh.	Mohammedan	Anglo-Indian.	Indian Christian.
Madras	215	146	30	1	..	28	2	3	8	6	6	1	6	6	..	1	..	1
Bombay	175	114	15	1	..	29	2	3	3	7	2	1	7	5	..	1	..	..
Bengal	250	78	30	..	..	117	3	11	2	19	5	2	8	2	..	2	1	..
United Provinces	228	140	20	..	..	64	1	2	2	3	6	1	3	4	..	2	..	..
Punjab	175	42	8	..	31	84	1	1	2	1	5	1	3	1	1	2	..	..
Bihar	152	86	15	7	..	39	1	2	1	4	4	1	3	3	..	1	..	..
Central Provinces and Berar	112	84	20	1	..	14	1	1	..	2	3	1	2	3	..	..	..	..
Assam	108	47	7	9	..	34	..	1	1	11	..	..	4	1	..	..	..	..
North-West Frontier Province	50	9	..	..	3	36	..	..	..	..	2	..	..	..	..	..	..	..
Orissa	60	44	6	5	..	4	..	..	1	1	2	..	1	2	..	..	..	..
Sind	60	18	..	..	..	33	..	2	..	2	2	..	1	1	..	1	..	..

In Bombay seven of the general seats shall be reserved for Marathas.
In the Punjab one of the Landholders' seats shall be a seat to be filled by a Tumandar.
In Assam and Orissa the seats reserved for women shall be non-communal seats.

TABLE OF SEATS.—*Provincial Legislative Councils.*

1. Province.	2. Total of Seats.	3. General Seats.	4. Mohammedan Seats.	5. European Seats.	6. Indian Christian Seats.	7. Seats to be filled by Legislative Assembly.	8. Seats to be filled by Governor.
Madras	Not less than 54 Not more than 56	35	7	1	3	..	Not less than 8. Not more than 10.
Bombay	Not less than 29 Not more than 30	20	5	1	..	..	Not less than 3. Not more than 4.
Bengal	Not less than 63 Not more than 65	10	17	3	..	27	Not less than 6. Not more than 8.
United Provinces	Not less than 58 Not more than 60	34	17	1	..	..	Not less than 6. Not more than 8.
Bihar	Not less than 29 Not more than 30	9	4	1	..	12	Not less than 3. Not more than 4.
Assam	Not less than 21 Not more than 22	10	6	2	..	..	Not less than 3. Not more than 4.

CHAPTER VI.

The special responsibilities of the Governors in the Provinces are concerned with

Special responsibilities of the Governors.

(a) The prevention of grave menace to the peace or tranquillity of the Province or any part thereof.

(b) Safeguarding of the legitimate interests of the minorities.

(c) Securing to persons who are or have been members of the public services rights guaranteed to them by or under the Act and safeguarding their legitimate interests.

(d) Securing in the sphere of executive action the powers which are reserved in the Governor's discretion in the legislative sphere.

(e) Securing the peace and good government of areas declared to be partially excluded areas under the Act.

(f) The protection of the rights of Indian States and the rights and dignity of the Rulers thereof.

(g) Securing the execution of orders and directions lawfully issued by the Governor-General in his discretion under the Act (Sec. 52).

Very extensive discretionary powers are further reserved to the Governors by Sec. 57 to deal with crimes of violence aimed at overthrowing the Government, and attempts, preparation and conspiracies to that end.

Ministers in the Provinces and Advocate-Generals.

In these reserved matters, the Governor is to act according to his discretion and individual judgment, but subject thereto, the administration is intended to be carried on by Ministers responsible to the Legislature.

As in the Centre, the Ministers, where the Legislature is two-chambered, have the right to address but not vote in the Chamber to which they have not been elected as representatives. The Advocate-General for the Province has a similar right to address but not to vote in the House or Houses (Sec. 64). **1892—1935.**

Governor's Powers in relation to Legislation.

The powers of assenting to, returning for reconsideration, reserving and vetoing legislation remain as under the repealed Act (Secs. 75—76). The Governor can pass a measure not accepted by the Legislature as a "Governor's Act" in circumstances similar to those in which the Governor-General can pass a "Governor-General's Act" (Sec. 90). He can, as formerly, prohibit the discussion in the Legislature of any measure in the interest of public peace and tranquillity (Sec. 86). In addition the Act authorises the Governor to issue Ordinances to meet emergencies, as also when the Legislature is in recess, in like manner as the Governor-General (Secs. 88—89). He has also the like power to arrange for joint sittings of the Chambers, where the Legislature is bicameral (Sec. 74).

Provision in case of failure of the Constitutional Machinery in the Centre and in the Provinces.

Provision has been made for the Governor-General or a Governor, as the case may be, to assume by proclamation personal control of the powers and functions of government in the event of a failure of the constitutional machinery in his Government (Secs. 45 and 93).

Division of subjects for purposes of legislation between the Central and the Provincial Governments.

The Act has apportioned subjects for legislation between the Federal and the Provincial Legislatures by providing for an exclusively "Federal Legislative List", an exclusively "Provincial Legislative List", and a third List of subjects in respect of which they are to have concurrent jurisdiction and hence called the "Concurrent Legislative List" (Sec. 100). But

CHAPTER VI.

power is reserved to the Federal Legislature, after a proclamation of emergency by the Governor-General, to legislate for any Province in matters belonging to it (Sec. 102). Two or more Provinces may also mutually consent by resolutions passed by their Legislatures that Provincial matters of common interest be dealt with by Federal legislation (Sec. 103). In respect of any matter not falling within any of the Lists, the Governor-General is empowered by notification to authorise either the Federal or the Provincial Legislature to deal with it (Sec. 104). Sec. 107 provides when, in the event of inconsistent legislation having been enacted, the Federal or the Local law, as the case may be, is to prevail.

"Excluded" and "Partially Excluded" areas.

Certain areas, called respectively the "excluded" and "partially excluded" areas, are placed outside the scope of Federal and Provincial legislation. Such areas may be extended or reduced and their boundaries altered in like manner as the boundaries of Provinces, namely, by Orders in Council (Secs. 91 and 290). The Governor of the Province within which any such areas is included is authorised, subject to approval by the Governor-General and subject also to disallowance by the Crown, to make regulations for these areas or extend to any such area Acts passed by the Federal or the Provincial Legislature by public notification, subject to such exceptions and modifications as he may deem fit (Sec. 92).

Chief Commissionerships.

Areas to be administered by the Governor-General through the Chief Commissioners comprise British Baluchistan, Delhi, Ajmer-Merwara, Coorg, the Andaman and Nicobar Islands, and the area known as Panth Piploda. Aden has ceased to be a part of India under the Act. The Legislative Council of Coorg has been provisionally retained in the Act. As regards British

Baluchistan (to which the executive authority of the Federation extends as it does to other Chief Commissioners' Provinces) and the Andaman and Nicobar Islands, the Governor-General may, subject to disallowance by the Crown, make regulations for them according to his discretion and by regulation repeal or amend any Act of the Federal Legislature which for the time being may be applicable to them (Secs. 94—97). 1892—1935.

Apportionment of revenues and revenue resources, and suability of the Federation and the Provinces in their own names.

The Act makes definite provisions for apportionment of revenues between the Federation on the one hand and the Federal Units on the other (Secs. 136—147). A change apparently consequential upon the autonomisation of the Units is the provision in Sec. 176 of the Act, according to which, instead of the Secretary of State in Council representing the Government in all suits by or against it, the Federation and the Provincial Governments are to sue and be sued in their respective names; and the section further lays down that, subject to any provisions which may be made by the Federal or the Provincial Legislatures, they may sue or be sued in relation to their respective affairs in like cases as formerly the Secretary of State in Council might have sued or been sued in Courts.*

The Federal Court.

As already stated, so far as concerns British India, the Federal Court will come into existence and begin functioning from before the institution of the Federation (Sec. 318). Its jurisdiction after the establishment of the Federation, as an original Court, will extend to disputes between any of the parties, namely, the Federation, any of the Provinces or any of the Federated States, if and in so far as such disputes should involve any

* For the law as it stood before the Act, see *Secretary of State* v. *Moment*, L. R. 40, I. A. 48; I. L. R. 40 Cal. 391 (1912), and pp. 83, 104 *ante*. Cf. Ghose, Tagore Law Lectures (1918) on Comparative Administrative Law, pp. 330-333.

CHAPTER VI.

questions whether of law or fact, on which the existence or extent of a legal right depends; provided that such jurisdiction shall not extend to (*a*) a dispute to which a State is a party unless this should (*i*) concern the interpretation of the Act or an Order in Council made thereunder or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of that State; or (*ii*) arises under an agreement made under the Act in relation to the administration in that State of a law of the Federal Legislature, or otherwise concerns some matter with respect to which the Federal Legislature has power to make laws for that State, or (*iii*) arises under an agreement made after the establishment of the Federation with the approval of His Majesty's representative for the exercise of the functions of the Crown in its relations with Indian States, between that State and the Federation or a Province, being an agreement which expressly provides that the said jurisdiction shall extend to such a dispute; it shall not extend also to (*b*) a dispute arising under any agreement which expressly provides that the said jurisdiction shall not extend to such a dispute. The Federal Court in the exercise of its original jurisdiction is not to pronounce any but a declaratory judgment (Sec. 204).

The Act empowers the Federal Court also to entertain appeals from judgments, decrees and final orders of any High Court of British India if such High Court certifies that the case involves a substantial question of law as to the application or interpretation of the Government of India Act or any Order in Council thereunder, and the duty is imposed on every High Court to consider in every case whether or not any such question is involved and of its own motion to give or withhold a certificate accordingly. The parties

may also appeal on any ground on which they could have previously appealed without special leave to the Privy Council and with the leave of the Federal Court on any other ground (Sec. 205). This section finally bars direct appeals in these cases from the High Courts to the Privy Council with or without special leave. 1892—1935.

The Federal Legislature, it is further laid down in Sec. 206, may provide that in civil cases, as may be specified in its Acts, appeal shall lie to the Federal Court from a judgment, decree or final order of a High Court in British India without any such certificate as aforesaid provided that (*a*) the amount or value of the subject-matter in dispute is not less than Rs. 50,000 or such other sum not less than Rs. 15,000, as may be specified, in the Court of first instance and at the time of appealing, or the judgment, decree or final order involves directly or indirectly some claim or question respecting property of like amount or value; or (*b*) the Federal Court gives special leave to appeal. The Federal Legislature may, in the event of passing such an Act, with the previous sanction of the Governor-General, legislate also for the abolition in whole or in part direct appeals in civil cases from the High Courts to the Privy Council.

An appeal shall lie under Sec. 207 to the Federal Court from a High Court in a Federated State on the ground that a question has been wrongly decided (*a*) concerning the interpretation of the Act or an Order in Council thereunder or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of that State, or (*b*) arising under an agreement made under the Act in relation to the administration in the State of a law of the Federal Legislature. Such appeal shall be by way of special case, stated for the opinion of the Federal Court or

CHAPTER VI.

called for by it. The decisions of the Federal Court given in the exercise of its original jurisdiction in any dispute which concerns the interpretation of the Act or an Order in Council thereunder or the extent of the legislative and executive authority vested in the Federation by virtue of the Instrument of Accession of any State or arises under any agreement made under the Act in relation to the administration in any State of a law of the Federal Legislature will be appealable without leave to the Privy Council. In other cases, leave of the Federal Court or the Privy Council will be necessary (Sec. 208).

All authorities, civil and judicial, throughout the Federation are required to act in aid of the Federal Court (Sec. 210), and the law declared by the Federal Court and by any judgment of the Privy Council is, so far as applicable, binding authority on all Courts in British India, and so far as respects the application and interpretation of the Act and Orders in Council thereunder or any matter with respect to which the Federal Legislature has power to make laws in relation to the State, binding authority in the Federal State (Sec. 212).

Finally by Sec. 213, the Governor-General is given constitutional authority to take the opinion of the Federal Court on questions of public importance, such opinion being required to be delivered in open Court, a non-concurring judge not being precluded from delivering his dissenting opinion.

Judges of the Federal Court are to be appointed from persons possessing specified qualifications by Royal Warrant and will hold office until they attain the age of 65 years. But they may resign earlier and may be removed by Royal Warrant on the ground of misbehaviour or infirmity of mind or body upon

a report received from the Judicial Committee of the Privy Council recommending such removal (Sec. 200). 1892—1935.

The High Courts.

The High Courts in British India, dealt with under the new Act, include, besides the Chartered High Courts, the Chief Court in Oudh, the Judicial Commissioner's Courts in the North-West Frontier Province and in Sind; and any other Court may be constituted into a High Court for the purpose of the Act by Order in Council. The requirement in the old Act that certain appointments or given percentages thereof should be filled from specified categories of qualified persons is abrogated, and the tenure of appointment is made the same as in the case of the Federal judges save in respect of the age of retirement which for High Court judges is fixed at 60 years (Secs. 219, 220).

The Services. Public Service Commissions. Sectional claims to shares in the appointments.

The provisions in the Act bearing on the Services are not entirely new, for, as previously stated, the Act of 1919 had already secured for holders of offices under the Government of India a quasi-legal tenure, and certain pledges of security given in it were later implemented upon the results of the recommendations of the Lee Commission appointed for that purpose. Part X of the Act amplifies and codifies the provisions as to both the Defence and the Civil Services, in particular laying down the manner and the principles according to which recruitments to the various services are to be made. The new Act makes provisions for the establishment of Public Service Commissions, one for the Federation and others to function in the Provinces. The machinery of the Public Service Commission is expected to secure just treatment for Government employees without prejudice to the public interest.

A feature in this Service Code which calls for notice is the statutory recognition given to the claims

CHAPTER VI.

of different sections of the Indian Public to legitimate shares in the appointments under Government and claims even to preferential consideration by reason of past association of members of particular communities with particular branches of the service, e.g., of Anglo-Indians in relation to the Railway, Customs, Postal and Telegraph Services (Sec. 242).

Charter of rights of the Civil employees under the Government.

As regards persons in the Civil Services under the Crown in India, Sec. 240, which is given below, provides what constitutes their charter of rights :

Sec. 240. (1) Except as expressly provided by this Act every person who is a member of a Civil Service of the Crown in India or holds a civil post under the Crown in India, holds office during His Majesty's pleasure.

(2) No such person as aforesaid shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed.

(3) No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him :

Provided that the sub-section shall not apply

(*a*) When a person is dismissed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge ; or

(*b*) Where an authority to dismiss a person or reduce him in rank is satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause.

(4) Notwithstanding that a person holding a civil post under the Crown holds office during His Majesty's pleasure, any contract under which a person not being a member of a Civil Service of the Crown in India is appointed under the Act to hold such a post, may, if the Governor-General, or, as the case may be, the Governor deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate the post. **1892—1935.**

Holders of posts, reserved for filling by appointments made by the Secretary of State (designated "Reserved Posts" as to which *see* Sec. 246), have the following further rights :

Sec. 248. (1) If any person appointed to a civil service or a civil post by the Secretary of State is aggrieved by an order affecting the conditions of his service and on due application to the person by whom the order was made does not receive the redress to which he considers himself entitled, he may, without prejudice to any other mode of obtaining redress, complain, if he is serving in connection with the affairs of the Federation, to the Governor-General, and, if he is serving in connection with the affairs of a Province, to the Governor of the Province, and the Governor-General or Governor, as the case may be, shall examine into the complaint and cause such action to be taken thereon as appears to him exercising his individual judgment to be just and equitable.

(2) No order which punishes or formally censures any such person as aforesaid, or affects adversely his emoluments or rights in respect of pension or decides

adversely to him the subject-matter of any memorial shall be made, except, if he is serving in connection with the affairs of the Federation, by the Governor-General, exercising his individual judgment, or, if he is serving in connection with the affairs of a Province, by the Governor of that Province, exercising his individual judgment.

(3) Any person appointed to a civil service or a civil post by the Secretary of State may appeal to the Secretary of State against any order made by any authority in India which punishes or formally censures him, or alters or interprets to his disadvantage any rule by which his conditions of service are regulated.

(4) Any sums ordered to be paid out of the revenues of the Federation or a Province to or in respect of any such person as aforesaid on an appeal made under this section shall be charged on these revenues.

Sec. 249. (1) If by reason of anything done under this Act the condition of service of any person appointed to a civil service or civil post by the Secretary of State has been adversely affected, or for any other reason it appears to the Secretary of State that compensation ought to be granted to, or in respect of, any such person, he or his representatives shall be entitled to receive from the revenues of the Federation, or if the Secretary of State so directs, from the revenues of a Province, such compensation as the Secretary of State may consider just and equitable.

(2) Any sum payable under this section from the revenues of the Federation or the revenues of a Province shall be charged on the revenues of the Federation or, as the case may be, that Province.

(3) For the avoidance of doubt, it is hereby declared that the foregoing provisions of this section

in no way prohibit expenditure by the Governor-General, or, as the case may be, the Governor, from the revenues of the Federation or a Province by way of compensation to persons who are serving or have served His Majesty in India in cases to which these provisions do not apply. 1892—1935.

The Reserve Bank and the Federal Railway Authority, and the Governor-General's special responsibilities in relation thereto.

The Service Code in Part X of the Act is intended not only to secure to Government employees fair treatment but also to safeguard them from being subjected to partisan political influences which popular government newly introduced shows a tendency to bring in its train. The Act attaches equal importance to keeping free from similar influences two institutions, namely, the Reserve Bank of India which has been already established by Indian enactment and the Federal Railway Authority which is constituted by the Act itself. Though the Federal Legislature is to continue to exercise general control over railway policy, the Federal Railway Authority (and not a department of the Federal Administration itself) will supervise and control the working of the Railways.

With regard to the Reserve Bank, Sec. 152 reserves the following as functions which the Governor-General shall exercise in his discretion, namely,

(*a*) the appointment and removal from office of the Governor and Deputy Governors of the Reserve Bank of India, the approval of their salaries and allowances, and the fixing of their terms of office ;

(*b*) the appointment of an officiating Governor or Deputy Governor of the Bank ;

(*c*) the supersession of the Central Board of the Bank and any action consequent thereon ; and

(*d*) the liquidation of the Bank.

CHAPTER VI.

Besides, under Sec. 153, no bill or amendment which affects the coinage or currency of the Federation or the constitution or functions of the Reserve Bank of India shall be introduced into or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.

In the same way, no bill or amendment making provision for regulating the rates or fares to be charged on any railway shall be introduced or moved in either Chamber of the Federal Legislature except on the recommendation of the Governor-General (Sec. 192).

Immunity from Actions and Proceedings of Governor-General and Governors.

Of special interest to students of the history of constitutional law is the provision of Sec. 306 of the Act that neither the Governor-General nor the Governor of a Province shall be subject to any proceeding in a Court of India whether in a personal capacity or otherwise in respect of anything done or omitted to be done by any of them during his term of office. This section not only supersedes the unhappy accumulation of vestigial survivals of fragmentary statutory enactments dating from the 18th century downwards which got codified and embodied in Secs. 110 and 111 of the Act of 1919 but also removes, so far as concerns India, the conflicting views upon the legal responsibility of these authorities which have been suggested by *Tandy* v. *Westmoreland* (1792) 27 St. Tr. 1246, 1260 and *Hill* v. *Bigge* (1841) 3 M. P. C. C. 465, 480, amongst other decisions.*

---

* For the law as it stood previously and its uncertainties, see Ghose, Tagore Law Lectures (1918) on Comparative Administrative Law, pp. 344-350.

1892—1935.

"Subjects' Rights" and safeguards against "discriminations".

The demand for inclusion in the Act of a "Bill of Subjects' Rights" did not find favour with Parliament. The only provisions savouring of it are those which provide that no subject of the Crown domiciled in British India is to be considered ineligible for office under it or be prohibited from carrying on any trade, business or profession in India on the ground of religion, place of birth, descent or colour (Sec. 298); and that no person shall be deprived of property without the authority of law, and in the case of compulsory acquisition of land for public purposes without payment of compensation, provision for which must be made in the law authorising such acquisition, and, further, that no bill or amendment making provisions for the transfer to public ownership of any land or for the extinguishment or modification of the rights of private persons therein, including rights or privileges in respect of land revenue, is to be introduced or moved in either the Central or a Provincial Legislature without the previous sanction of the Governor-General or the Governor as the case may be (Sec. 299). Special note should be taken, in connection with these provisions, of those of Part V, Ch. III of the Act (Secs. 111—118, 120), which, broadly speaking, are aimed against discriminations in favour of British Indian subjects adversely affecting British subjects domiciled in the United Kingdom and Burma, and companies incorporated in those countries, so long as there may be no like discriminations made in those countries adversely affecting British Indians; against ships and aircrafts registered in the United Kingdom being subjected to similar discriminatory treatment in the absence of like justifying causes; against medical qualifications approved in the United Kingdom not receiving equal recognition in India in the absence of like treatment in that Kingdom of holders

CHAPTER VI.

of medical diplomas approved in India. Sec. 119 is specially directed against manipulations, by law or regulation, of professional, technical and other qualifications prescribed as conditions for admission to occupation, trade or business which are not called for in the public interest and which may bear unfairly against any class of persons. Sec. 121 entitles medical officers holding commissions from His Majesty in the Indian Medical Service or any other branch of His Majesty's forces and in the active list thereof to practice medicine, surgery and midwifery in British India and to be registered as so qualified.

No "constituent powers" given to Indian Legislatures. Mode of Amendment of certain parts of the Act.

No previous Government of India Act had felt free to grant constituent authority to the Indian Legislatures. The variety and multiplicity of safeguards which form the fundamental feature of the new constitution of India would not admit of such powers being conferred by the new Act, and it does not do so. It has however provided a method of amendment in respect of a number of specified matters which may prove less cumbrous and dilatory than *ad hoc* amending legislation in Parliament. Amendment of these provisions of the Act may be effected, as provided by Sec. 308 of the Act, by means of Orders in Council presented to Parliament and approved by both Houses. Power is given to the Legislatures in India also, after ten years' working of the Act, to take the initiative for such amendments by resolutions agreed to at their meetings, which the Governor-General or the Governor, as the case may be, will then transmit to the Secretary of State to be laid before the Houses of Parliament with the Governor-General or Governor's opinion thereon.

Burma.

It will be convenient to note here some of the most distinctive features of the new constitution of Burma

as enacted in 26 Geo. V, c. 3. It has been already stated that Burma has been placed outside the Indian Federation and given a unitary constitution. In its bicameral legislature, the Upper Chamber, styled the Senate, is to consist of 36 members, and the Lower, styled the House of Representatives, of 130 members, to be chosen in accordance with rules provided in a Schedule to the Act. The Governor of Burma will be the head of the Executive, with a "Council of Ministers" not exceeding ten in number to aid and advise him in the exercise of functions other than those resting in his discretion. He has reserved functions corresponding to those of the Governor-General of India which he is to exercise in his discretion and for the exercise of which he may appoint "Counsellors" not exceeding three in number, and he has besides special responsibilities analogous to those vested in the Governor-General and Governors under the India Act. The Counsellors and Ministers may take part in all legislative proceedings but without the right to vote unless otherwise entitled. Upon any question arising as to whether a matter is or is not one resting in the Governor's discretion and individual judgment, the Governor's decision is, like that of the Governor-General's under the India Act, final and not open to question by any authority. But, as is the case with the Governor-General under the India Act, in all matters concerning the exercise of his discretion and individual judgment, the Governor (subject to his Instrument of Instructions) is placed under the general control of, and specific directions from time to time to be issued by, the Secretary of State, acting with or without the concurrence, as the case may be, of his "Advisers" as provided in the Act. Like the Governor-General under the India Act, the Governor will have a Financial

1892—1935.

CHAPTER VI.

Adviser, and the Province will have an Advocate-General who will have the power, without right to vote, to address the Chambers. It will thus be seen that the Constitution of Burma combines features taken and adapted from those of the Provincial and the Central Governments of India, barring such, of course, as are concerned with the Federation of the States and the Provinces. It follows that the constitution of Burma has no place for a Federal Court. The Burma High Court has been reconstituted on lines closely analogous to those of the Indian High Courts. The changes introduced in the powers and functions of the High Courts of India and Burma will be considered in appropriate contexts in Chapters XI and XII. The "subjects' rights" and safeguards against "discrimination" in the Burma Act correspond closely to those in the India Act, as do a variety of other matters which do not call for specific notice in this place.

CHAPTER VII.

LATER HISTORY: THE PRESIDENCY TOWN SYSTEM.

The Presidency Town system—Duration of the Supreme Court at Calcutta—Inconveniences of the double system—Extension of Criminal jurisdiction—Of the Admiralty jurisdiction—Gaol Deliveries—Jurisdiction extended over the Province of Benares—Madras and Bombay—Recorders' Courts established in 1797—Supreme Court at Madras—Supreme Court at Bombay—Dissensions at Bombay—Inferior judicial authorities—Courts of Requests—Small Cause Courts—Justices of the Peace—Control of the Supreme Court over them—Appointment of Justices of the Peace—Their Jurisdiction and Powers—Presidency Town Magistrates—Coroners—Rival judicial institutions—Tendency to amalgamation—Conclusion.

The Presidency Town system.

To pass on now to the history of the judicial institutions established in India previous to the introduction of the High Courts, of these institutions several had been established by the Crown and Parliament before the acquisition of territorial sovereign power. Others were at a later period substituted for them by the same authority. Although the later Courts so established had some jurisdiction in the Provinces, yet they were originally intended for the benefit of the Company's factories, and subsequently for the Presidency Towns, and their retention served to maintain the separation between the Presidency Towns and the Mofussil. Notwithstanding their partial jurisdiction in the Mofussil, it is convenient to collect these institutions under the head of the Presidency Town system, including all which were established by the Crown or Parliament, and which were not vested with or did not exercise a general jurisdiction in the Provinces.

CHAPTER VII.

Duration of the Supreme Court at Calcutta.

Foremost amongst these institutions came the Supreme Court at Calcutta, which, as it was finally established under the Act of 1781, continued to exist for a period of upwards of eighty years and was presided over by a long series of eminent Judges. In 1861 an Act* was passed which led in the next year to the abolition of a tribunal, which began in discredit and with general reprobation, but finally obtained a lasting hold on the respect and confidence alike of Natives and Europeans. Under the Act of 1861, Royal Charters were issued establishing the existing High Courts, and from the date of the new Courts coming into existence, viz., in July 1862, the Supreme Court ceased to exist.

Inconveniences of the double system.

The history of the Court in Calcutta in the intermediate space of time was not marked by any of the dissensions and violent contests which preceded that period. But, nevertheless, many inconveniences remained and were inseparable from the double system of judicial administration which prevailed. The Company's Courts had no jurisdiction for a long time, civil or criminal, over British-born subjects. The Crown Courts could harass but could not control the Courts of the Company with which they had occasionally concurrent jurisdiction, and had but little authority over the general course of justice. There was, as Chief Justice Sir C. Grey pointed out,† an utter want of connection between the Supreme Court and the Provincial Courts and the two sorts of legal process which were employed in them. And the exercise of the powers of the one system was viewed with jealousy by those who were connected with the other; every Court in India being further liable to be perplexed by

---

* 24 & 25 Vict., c. 104.

† Sir C. E. Grey's Minute, p. 1154.

the obligation which more or less was imposed upon all of administering three or four different sorts of law to as many classes of persons. Nevertheless the two systems were maintained; and the jurisdiction of the Supreme Court was from time to time extended by various Acts of Parliament to which reference will now be made. 1781—1872.

Extension of criminal jurisdiction.

With regard to criminal jurisdiction, an Act* of Parliament was passed in 1784, the effect of which was to vest the Supreme Court with jurisdiction to try all criminal offences committed by any of His Majesty's subjects in the territories of any Native Prince or State, or against their persons or properties, or the persons or properties of any of their subjects or people, in the same manner as if the same had been committed within the territories directly subject to the British Government in India. Two years later another† Act of Parliament was passed, whereby all servants of the East India Company and all His Majesty's subjects resident in India were made subject to the Courts of Oyer and Terminer and Gaol Delivery for all criminal offences committed in any part of Asia, Africa, and America, beyond the Cape of Good Hope and the Straits of Magellan, within the limits of the Company's trade.

By the same Act‡ jurisdiction, as well civil as criminal, was given to the Governor's Council and Mayor's Court at Madras over all British subjects residing in the territories of the East India Company on the Coast of Coromandel, or in any other part of the Carnatic or in the Northern Circars or within the territories of the Soubah of the Deccan, the Nabob of Arcot, or the Rajah of Tanjore.

* 24 Geo. III, c. 25, s. 44.
† 26 Geo. III, c. 57, s. 29.
‡ Section 30.

CHAPTER VII.

Of the Admiralty jurisdiction.

With regard to the Admiralty jurisdiction doubts arose how far in criminal matters it was limited by the original Charter to offences committed on the coast of Bengal, Behar, and Orissa within the ebbing and flowing of the sea at high water mark. An Act of Parliament* accordingly extended the power and authority of the Court to the high seas so as to give a full jurisdiction over all offences committed thereon to be exercised according to the laws and customs of the Admiralty of England. Seven years later† the Crown was empowered to appoint all or any of the Judges of the Supreme Court at Fort William (or of either of the similar Courts at Madras and Bombay) either alone or jointly with others to be Commissioners for the trial and adjudication of prize causes and other maritime questions arising in India. And a further doubt having arisen whether the Admiralty jurisdiction of the Courts of Calcutta, Madras, and Bombay extended to any persons but those who were amenable to their ordinary jurisdiction, it was enacted ‡ that they might take cognizance of all crimes perpetrated on the high seas by any person or persons whatsoever in as full and ample a manner as any other Court of Admiralty Jurisdiction established by His Majesty's authority in any colony or settlement whatsoever belonging to the Crown of the United Kingdom.

Gaol Deliveries.

It was also enacted,§ in order to prevent any delay of justice or the unnecessary detention of persons charged with offences, that all His Majesty's Courts exercising criminal jurisdiction within the three Presidencies of the Company should, four times at the least

---

* 33 Geo. III, c. 52, s. 156.
† 39 & 40 Geo. III, c. 79, s. 25.
‡ 53 Geo. III, c. 155, s. 110.
§ *Ibid.*, s. 102.

in every year, hold their sessions for the purpose of taking cognizance of all matters relating to pleas of the Crown. 1781—1872.

Some time after the establishment of the Supreme Court at Calcutta, the province or district of Benares was ceded to the Company and was annexed to the Presidency of Fort William. Parliament thereupon enacted that that province as well as all other provinces or districts which might thereafter at any time be annexed should, with their subordinate factories, be subject to the jurisdiction of the Court.* As regards the Benares district the Act took effect from the first of March 1801. **Jurisdiction over the Province of Benares.**

The powers of the Supreme Court were thus gradually extended within the limits marked out by the Act of 1781. It had five jurisdictions, viz., civil criminal, equity, ecclesiastical, and admiralty. An appeal lay to the Privy Council in all suits when the amount in dispute was of the value of Rs. 10,000.

In the Presidencies of Madras and Bombay the experiment of establishing a Supreme Court was not made for some time; and apparently it was in contemplation to abstain altogether from it. **Madras and Bombay.**

The Mayors' Courts, which were established at Madras and Bombay in 1753, existed till the year 1797, nearly a quarter of a century longer than the similar tribunal in Calcutta. Even in that year, when they were abolished, Parliament did not establish Supreme Courts in their stead. They were replaced by Recorders' Courts.† These consisted of the Mayor, three Aldermen and a Recorder, being in fact the old Mayors' Courts, **Recorders' Courts established in 1797.**

* 39 & 40 Geo. III, c. 79, s. 20.
† 37 Geo. III, c. 142.

CHAPTER VII.

with the addition of a Recorder to each Court, who was to be appointed by the Crown. They had civil, criminal, ecclesiastical, and admiralty jurisdiction. They had power to try all suits which by authority of Parliament could be tried in the Mayors' Courts. Their jurisdiction extended over British subjects resident within the British territories subject to the Governments of Madras and Bombay respectively, or within the territories of Native Princes in alliance with these Governments.

Restrictions corresponding to those imposed by Parliament in 1781 on the jurisdiction of the Supreme Court of Calcutta were made applicable to these Recorders' Courts.

Supreme Court at Madras.

The new Courts did not last long. That at Madras existed for two years and was then abolished,* a Supreme Court being established in its stead. The powers vested in the Recorder's Court were transferred to the new Supreme Court, which was also directed to have the like jurisdiction and to be subject to the same restrictions as the Supreme Court of Judicature at Fort William at Bengal. This new Charter was granted in December 1801.

Supreme Court at Bombay.

The Recorder's Court at Bombay existed till 1823, when a Supreme Court of Judicature was established in its stead, and was invested with the same powers and authorities as the Supreme Court of Calcutta, with a similar jurisdiction and subject to the same limitations, restrictions, and control.

The Charter† of the Bombay Court appears to have been slightly different from the other two Charters.

---

* 39 & 40 Geo. III, c. 79.

† Morley's Digest, p. 20.

The Supreme Court in that Presidency was prohibited from interfering in any matter concerning the revenue even within the town of Bombay. Natives also were exempted (and this provision appears in the Madras Charter also) from appearing therein, unless the circumstances were altogether such that they might have been compelled to appear in the same manner in a Native Court. In crimes maritime the Bombay Court's jurisdiction was restricted to such persons as would have been amenable to it in its ordinary jurisdiction. 1781—1872.

Dissensions at Bombay.

The constitution of the Supreme Court at Bombay was followed shortly afterwards by disputes between the Court and the Local Government similar in character (but on a smaller scale) to those which before 1781 had produced so much commotion in Bengal. The Judges, claiming the powers of the Court of King's Bench, issued writs of *Habeas Corpus*, one* to bring a Native boy from Poona to Bombay, and another to compel a gaoler to produce a prisoner detained under an order of one of the Company's Judges. The execution of the first was resisted by the Magistrate of Poona with the sanction of Government, because the affidavits on which it was granted were said to be false, and because neither Poona, nor the boy detained, nor the person detaining were subject to the jurisdiction of the Court. The other was resisted on the ground that the Supreme Court had no power to discharge persons imprisoned under the authority of a Native Court.

The proceedings came before the Privy Council on the petition of the sole surviving Judge who had issued the writs. The Privy Council decided that they had

---

* *In re Justices of the Supreme Courts*, Knapp's Privy Council Reports, Vol. I, p. 1; and see case of *Moro Ragonath*, Asiatic Journal for April 1829, and Mill's History of India, Vol. IX, p. 196.

CHAPTER VII.

been improperly issued; that the Supreme Court at Bombay had no power to issue a writ of *Habeas Corpus* except when directed either to a person resident within those local limits wherein such Court had a general jurisdiction, or to a person out of such local limits who was personally subject to its civil and criminal jurisdiction. They also held that the Court had no power to issue a writ of *Habeas Corpus* to the gaoler or officer of a Native Court as such officer, the Court having no power to discharge persons imprisoned under the authority of a Native Court.

Inferior judicial authorities.

The Supreme Courts were the chief tribunals which owed their authority exclusively to the English Parliament and Crown. There were, however, other judicial authorities, derived from the same source, which long existed in India (some of them not yet abolished), and which were originally established in days before the Company had obtained sovereign power and when they had merely to govern their own servants and those resident under their immediate protection.

Courts of Requests.

Courts of Requests, for instance, were established by the Charter of 1753, which renewed the Mayors' Courts in the three Presidency Towns. They were empowered to determine suits when the debt, duty, or matter in dispute did not exceed five pagodas, i.e., twenty rupees. In 1797* their jurisdiction was extended, the pecuniary limit being then fixed at eighty rupees. Two years later another Act† was passed which gave certain powers to the Governments of Bengal and Madras, under which Commissioners were established for the recovery of small debts, and their jurisdiction gradually extended up to 400 Sicca rupees.

---

* 37 Geo. III, c. 142, s. 30.
† 39 & 40 Geo. III, c. 79, s. 17.

Doubts arose as to the powers of the Calcutta Commissioners, and Act XII of 1848 was passed better to define their jurisdiction. The Courts of Requests were originally made subject to the order and control of the Supreme Courts in the same manner as the inferior Courts in England are by law subject to the order and control of the Court of Queen's Bench. 1781—1872.

Small Cause Courts.

These Courts of Requests were in 1850 superseded by the establishment of Small Cause Courts in the Presidency Towns. The jurisdiction of these new tribunals was subsequently extended and similar tribunals were also established in the Mofussil.

The Small Cause Courts, the Insolvent Courts, and the Vice-Admiralty Courts continue to exist at the present day and will be more conveniently described when the existing judicial system will come up for consideration.

Justices of the Peace.

The next judicial officers, who formed part of the Crown or Parliamentary system introduced into India were the Justices of the Peace. They were first established at Madras, Bombay, and Calcutta by the Charter of George I in 1726, which appointed the Governor and Councils of these places to be Justices of the Peace, with power to hold Quarter Sessions.

This was at a time when the only object was to introduce a purely English system for the benefit of English and other servants of the Company. The Regulating Act* made the Governor-General in Council and Judges of the Supreme Court Justices of the Peace for the settlement of Fort William and the settlements and factories subordinate thereto. The Governor-General and Council were directed to hold Quarter

* 13 Geo. III, c. 63, s. 38.

CHAPTER VII.

Sessions within the settlement of Fort William; such Quarter Sessions to be a Court of Record.

Control of the Supreme Court over them.

The Supreme Court Charter authorized the new Court to control the Court of Quarter Sessions and the Justices, exercising the same supervision and control over them as the Court of Queen's Bench exercises over the inferior Courts and Magistrates. It also empowered the Court to issue to them writs of *mandamus, certiorari, procedendo,* and *error.* The Judges of the Court were also appointed Justices of the Peace in the Lower Provinces of Bengal, with such jurisdiction and authority as Justices of the Queen's Bench have within England by the common law thereof.

Appointment of Justices of the Peace.

Originally the only Justices of the Peace in India were the Governors and Councils of the three Presidencies, and the Judges of the Calcutta Supreme Court. Subsequently, when Supreme Courts were established at Madras and Bombay, the Judges of those Courts were also made Justices of the Peace for their respective Presidencies; and the Courts were vested with the same authority as the Calcutta Supreme Court over the proceedings of the Justices.

In 1793* an Act of Parliament empowered the Governor-General in Council to appoint Justices of the Peace from the covenanted servants of the Company or other British inhabitants, to act within and for the three Presidencies and the places thereto subordinate respectively by commissions to be issued out of the Calcutta Supreme Court, on the warrant of the Governor-General in Council.

Justices so appointed were not to sit in any Court of Oyer and Terminer and Gaol Delivery, unless called

* 33 Geo. III, c. 52, s. 151.

upon by the Judges of the Supreme Court and specially authorized by order in Council. All proceedings before Justices* of the Peace were removable by *certiorari* into the Court of Oyer and Terminer. **1781—1872.**

In 1807† the Governors and Councils of Madras and Bombay were authorized to act as Justices of the Peace for those towns respectively, and to hold Quarter Sessions. They were also empowered to issue commissions under the seals of the Courts appointing British subjects to be Justices of the Peace in the provinces.

In 1832‡ the Governments of the three Presidencies were respectively empowered to appoint, in the name of the King's Majesty, any persons resident within the territories of the Company, and not being subjects of any foreign State, to act within and for the three Presidency Towns respectively as Justices of the Peace.

Their jurisdiction and powers.

The Governments of the three§ Presidencies, under the authority of Parliament, enacted from time to time various regulations authorizing and empowering Justices of the Peace to take cognizance of and punish certain offences.

Several Acts|| were passed by the Imperial Legislative Council to regulate the jurisdiction and powers of Justices of the Peace. Their jurisdiction extended over

---

* 47 Geo. III, c. 68, ss. 2 and 4.

† See 153rd section of the same Act.

‡ 2 & 3 Wm. IV, c. 117.

§ See Morley's Administration of Justice, p. 36.

|| See Act IV of 1835, Act I of 1837, Act XXXII of 1838, Act IV of 1843, Act VI of 1845, Acts VIII & IX of 1849, and Act VII of 1853.

CHAPTER VII.

the whole Presidency for which they were appointed. The classes subject to them* were—

(1) All persons whatever, whether British or Native subjects, in respect of offences committed within the limits of the ordinary jurisdiction of the Supreme Courts.

(2) All British subjects, resident in any part of the Presidency, except that, as regards crimes and offences triable by jury, and committed by British officers or soldiers at places more than 120 miles from the seat of Government, they were not called upon to interfere, such crimes being cognizable by a Court Martial.

(3) All persons who had committed crimes or offences at sea.

Lastly. All persons whatever resident without the jurisdiction of the Supreme Courts and the Court of the Recorder of Prince of Wales' Island were subject to the jurisdiction of Magistrates and Joint Magistrates acting as Justices of the Peace in certain cases. The law regulating the appointment and powers of Justices of the Peace was subsequently laid down by Act II of 1869, and afterwards by the Code of Criminal Procedure.

Presidency Town Magistrates.

Magistrates of Police for the Presidency Towns were first appointed under Act XIII of 1856. The Act required that they should be previously made Justices of the Peace; and gave to each of them all the powers and jurisdiction which are by law vested in two Justices of the Peace.

Both by the Code of Criminal Procedure passed in 1861 † and previously thereto, European British

---

* See Morley's Administration of Justice in India, p. 40.

† Act XXV of 1861, Sec. 39.

subjects could only be committed or held to bail for trial by a Justice of the Peace. A Magistrate (not being a Justice of the Peace) could only hear the complaint, issue a warrant of arrest, and hold him to bail with a view to the complaint being investigated by a Justice of the Peace. 1781—1872.

The functions of a Justice of the Peace were threefold; first, the trial and punishment under certain Acts and Statutes* of offences by summary conviction, and without a jury; secondly, the investigation of charges in view to the committal or discharge of the accused person; and thirdly, the prevention of crime and breaches of the peace.

Coroners.

By the 157th section of the Statute noted below,† it was recited that it was expedient that Coroners should be appointed for the settlements in India for taking inquests upon view of the bodies of persons coming or supposed to have come to an untimely end. Power was accordingly given to the three Governments within their several Presidencies to appoint by order in Council certain British subjects to be Coroners, and by like orders to supersede or remove them as occasion might require. They were, in respect of their powers and jurisdiction within the limits of the settlements for which they were appointed, placed on a similar footing to Coroners elected for any county or place in England.

All the Judges of the Supreme Court were made Coroners as well as Justices of the Peace for their respective Presidencies.

The law relating to Coroners and their juries was laid down in certain subsequent‡ Acts; but that

* See 53 Geo. III, c. 155; Act VII of 1853; and Criminal Procedure Code, 1861, Secs. 163 and 165.

† 33 Geo. III, c. 52.

‡ Acts XLV of 1850, IV of 1848, and XXVI of 1848.

CHAPTER VII.

which at present regulates their proceedings and the jurisdiction of Coroners is laid down in a later Act of the Imperial Legislative Council, viz., Act IV of 1871, amended as will be mentioned hereafter.

Rival judicial institutions.

Of the period of time just passed under consideration (1781—1861), half a century was marked by as wide a separation as was compatible with social order between the judicial authorities which controlled British-born subjects and ruled in the Presidency Towns and those which regulated the provinces and generally speaking the affairs of Natives. That separation originated in the peculiar circumstances under which a Company became as it were the rival of the Crown, and when once established, appealed to the prejudices of conquest and resisted all attempts to alter or abolish it. The Crown from the earliest introduction of its subjects into the country provided for the administration of justice amongst them by a system analogous to that which existed in England. The design of the Regulating Act was eventually to extend that system over the conquered country. It signally failed, and was from the first impossible. The Company, in the exercise of the sovereign power which it derived from the Mogul Emperor through the grant of the Dewanny, established a system of Courts suited to the wants of the country, but having no power over those who owed no allegiance to the Mogul. A compromise was made in 1781, by which the power of the Crown Courts was restricted, and the tribunals of the Company were recognized by Parliament. Thenceforward time and policy favoured amalgamation, but numerous circumstances and strong party feeling tended to prevent or delay it.

In the next two lectures will be traced the history of the Provincial Civil and Criminal Courts which were

established by the Company. It will be convenient however at this place to note the various encroachments which were made upon the exclusive jurisdiction over Europeans which belonged to the Courts established by Royal Charter, and the attempts which were made to transfer some portion of it to the rival institutions of the Company. 1781—1872.

Tendency to amalgamation.

In 1813 the first step was taken to vest the Company's Courts with civil jurisdiction over British subjects and destroy that complete independence of the local Courts which Europeans had previously possessed. It was enacted* in that year by Parliament that British subjects residing, trading, or holding immovable property in the provinces should be amenable to the Civil Courts in suits brought against them by Natives. Even then their distinctive privilege of exemption was not entirely lost sight of, and the right was given to them of appeal to the Supreme Court in cases where Natives had the right of appeal to the Sudder Court.

In 1836† after the establishment of the Legislature of 1834, an Act was passed which repealed the provision just quoted of the Statute of George III invidiously giving a right of appeal to the Supreme Court. It enacted that no person by reason of birth or descent should be exempt from the civil jurisdiction of certain of the Company's Courts therein specified, the number of which was increased by later legislation.‡

No further step was taken towards a uniform administration of civil justice till the union of the

* 53 Geo. III, c. 155, s. 107.

† Act XI of 1836.

‡ See Acts XXIV of 1836, III of 1839, VI of 1843, and III of 1850.

CHAPTER VII.

Sudder and Supreme Courts was effected by Act of Parliament. Since then Englishmen and Indians have been subject in civil matters to the same Courts and to the same procedure.

The general exemption of Europeans from the criminal jurisdiction of the provincial Courts remained till the Criminal Procedure Code of 1872. The earlier Code, and the Indian High Courts Act, both passed in 1861, recognized and preserved that exemption. And the powers of the old Supreme Court, derived from its Charter and from analogy to the Court of Queen's Bench, were retained by the High Court in its original jurisdiction.

Circumstances, however, led to that exemption being slowly and reluctantly challenged. By the Statute of George III (53 Geo. III, c. 155) the Magistrates in the provinces were authorized to act as Justices of the Peace, and to have jurisdiction over British subjects out of the Presidency Town in certain criminal cases and also in cases of small debts due by them to Natives. After the Legislature of 1834 was established, the jurisdiction of such Magistrates was gradually increased.* The Mahomedan Code of Criminal Law was gradually disused, and since 1861 the Penal Code has applied alike to Europeans and Natives. The Criminal Procedure Code of 1872 re-cast the Criminal Courts, and effected a considerable advance towards uniformity of criminal administration, preserving, however, to European British subjects such privileges as policy and safety seemed to require.

---

* See Acts XXXII of 1838, IX of 1849, IV of 1843 and VII of 1853.

CHAPTER VIII.

LATER HISTORY : THE PROVINCIAL CIVIL COURTS.

Foundation of Civil Courts—Establishment of Supreme Court—Rival establishments of the Company—Changes in the scheme of 1772—Native authority restored—Effect of the changes—Separation in 1780 of Civil and Revenue Jurisdiction—Struggles between Civil and Revenue Courts—Sudder Dewanny Adawlut——Re-union in 1787 of Civil and Revenue Jurisdiction by Lord Cornwallis—Changes in the Courts to effect that object—Second separation in 1793 of Civil and Revenue Jurisdiction—Reasons for that separation—Duties of Collectors—Re-organization of Civil Courts—Sudder Dewanny Adawlut—Provincial Courts of Appeal—Courts of Dewanny Adawlut—Lower grades of Judges—Changes in the Civil Courts in 1831—Gradual recovery by Collectors of jurisdiction over rent cases—First step—Second step—Third step—Collectors given exclusive jurisdiction in rent cases in 1831—Further extension of the Collector's jurisdiction—Suits cognizable by the Collectors under Act X of 1859—Control over the Collectors—Opposition to the passing of Act X of 1859—Consequences of the Act—Jurisdiction over rent cases re-assumed by Civil Courts since 1869—Act VIII of 1869 (B. C.)—Further History of the Civil Courts—Madras Courts—Inferior tribunals—Bombay Courts—Revenue jurisdiction in both Presidencies—General Codes of Civil Procedure and Evidence.

Foundation of Civil Courts.

THE earliest proceeding of any importance, with reference to the establishment of provincial Courts for the administration of civil justice, was the report of Warren Hastings and the scheme which was prepared in 1772.* A leading feature, it will be remembered, of that scheme was the union of fiscal and judicial authority in the same officers.

Establishment of Supreme Court.

Then followed the policy already described which led to the establishment of the Supreme Court, and the

* See *ante*, pages 30–31.

CHAPTER VIII.

disastrous results of the first few years of its administration. The plan, if ever it had been formed, as there seems reason to suspect, of drawing into the hands of the new Court the superintendence of the whole administration of justice, had obviously failed. So also had failed Mr. Sullivan's scheme for establishing a somewhat similar Court, whose members were to be appointed by the Company, and which it was intended should bring the whole of the Native Courts into subordination to it.* A Court therefore was established, whose jurisdiction extended over all the vast territories included in the Presidency of Fort William, but which was isolated from the general Courts of the country over which it failed to acquire any influence or authority. It had a personal jurisdiction thinly scattered over a dense population and a wide extent of country. It enforced that jurisdiction, issued its writs, seized and sold lands and property in the midst of people who lived under a different law and procedure from those observed by the Court, and were subordinate to other tribunals.

Rival establishments of the Company.

Contemporaneously with the establishment of the Presidency Town system which has been described in the last chapter, and which emanated mostly from the Crown and Parliament, the Company had striven to establish a system for the administration of justice throughout the Mofussil. The history of the civil and criminal institutions which were so established (and by aid of which, with occasional interference from the powers which belonged to the rival system, the Company endeavoured to rule the three Presidencies which they had acquired will be outlined in the present chapter).

* Fifth Appendix to Third Report of Select Committee, 1831; Sir C. Grey's Minute, pp. 1142, 1145.

The Regulating Act led to numerous alterations in the scheme of Warren Hastings; for the Governor-General was out-voted by a majority of his Council who had recently arrived from England. The changes which they made in the Civil Courts were as follows:— In 1775 the superintendence of the collection of the revenue was vested in six Provincial Councils, appointed for the respective divisions of Calcutta, Burdwan, Dacca, Moorshedabad, Dinagepore, and Patna; and the administration of civil justice was transferred from the European Collectors, who were recalled, to Native Amils who were appointed instead. From them an appeal lay in every case to the new Provincial Councils and thence under certain restrictions to the Governor-General and Council as the Sudder Adawlut.

1772—1908.

Changes in the scheme of 1772.

In the same year the Directors urged and effected the restoration of Mahomed Reza Khan to the high office which he had held at Moorshedabad, and from which he had been dismissed by Mr. Hastings.*

Native authority restored.

The majority of the Council were in favour of again making him in name and title the Naib Subah, i.e., in effect recognizing the existence of the Nabob's government, deeming that step politic for managing discussions with foreign factories. Mr. Hastings unsuccessfully opposed it, saying "that the Nabob is a mere pageant, without the shadow of authority, and even his most consequential agents receive their express nomination from the servants of the Company". The Judges of the Supreme Court had held the same thing when a servant of the Nabob's claimed exemption from their jurisdiction as an ambassador. "I do not", said Mr. Hastings, "remember any instance, and I hope

* Mill's History of England, Vol. III, p. 455.

CHAPTER VIII.

none will be found, of our having been so disingenuous as to disclaim our own power, or to affirm that the Nabob is the real sovereign of those provinces ".

Mahomed Reza Khan* was removed again in 1778, after Mr. Hastings had, through the death of one of his colleagues, become, with the aid of his own casting-vote, supreme in the Government.

Effect of the changes.

The effect of the alterations made in 1775, taken together with the transference of the Nizamut Adawlut from Calcutta to Moorshedabad, was to revive to some extent the Native Government for the purpose of administering civil and criminal justice, probably with a view to elude the interference of the Supreme Court, and to effect a considerable separation between that department and the business of revenue collection and management.

Separation in 1780 of civil and revenue jurisdiction.

In 1780 regulations were passed in pursuance of the legislative authority granted by the Regulating Act and by those regulations the separation just referred to between the judicial and revenue authority was completed. The jurisdiction of the six Provincial Councils was confined exclusively to revenue matters;† and it was resolved that, for the more effectual and regular administration of civil justice, district Courts of Dewanny Adawlut should be established within the jurisdictions of the six Provincial Councils. These Courts were to be independent of the Councils, and to exercise jurisdiction over all claims of inheritance to zemindaries, talookdaries, and other real property, or mercantile disputes, and all matters of personal property; all cases regarding revenue or rent being

* Mill's History of India, Vol. IV, p. 20.
† Reg. I. 1780, s. 3.

reserved for the exclusive cognizance of the provincial Councils or of the Collectors* who superseded them. 1772—1908.

Eighteen of these Dewanny Adawluts were established. Regulations for their guidance were drawn up by Sir Elijah Impey, and incorporated in a revised Code. The ultimate appeal lay to the Sudder Dewanny Adawlut. And shortly after this distinct separation of civil justice from revenue collection, the Supreme Court was deprived of the right to interfere in matters concerning the revenue.

Thus, in seven years from the date of Warren Hastings' scheme, which united in the same hands fiscal and judicial powers, a considerable alteration was made in the constitution of the tribunals of civil justice. The period had been conspicuous for the conflict which had been carried on between the Supreme Court and the Governor-General's Council, which resulted in the Act of Parliament of 1781. Experience seemed to suggest that it was advisable to divide the business of the provincial tribunals into two parts, that which peculiarly concerned the revenue, and that which peculiarly concerned individuals. The former continued to be preserved to the Provincial Councils, that is to the Collectors who eventually superseded them, but they were exonerated from the burden of adjudicating upon private disputes, which was transferred to separate Courts styled the Dewanny Adawluts.

Struggles between Civil and Revenue Courts.

Then there ensued a struggle between the Civil and Revenue Courts, insignificant no doubt as compared with the civil war which raged between the Supreme Court and the Supreme Council, but sufficient to engage the serious attention of Government. The rival claims

* See Harrington's Analysis, Vol. I, p. 31.

CHAPTER VIII.

of the Revenue and Civil Courts to exercise jurisdiction were destined to a long antagonism and to varying success. It is interesting to observe that, within a few months of the separation of their functions, the Governor-General penned a minute,* which said:—"The institution of the new Courts of Dewanny Adawlut has already given occasion to very troublesome and alarming competition between them and the Provincial Councils." The history of the Civil Courts of this country involves a narrative of these struggles which ensued between the revenue authorities and the judicial officers to gain exclusive jurisdiction.

Sudder Dewanny Adawlut.

From the first, however, the business of the Sudder Dewanny Adawlut was described to be not only to receive appeals from these Courts, but to superintend their conduct, revise their proceedings, remedy their defects, and generally to form such new regulations and checks as experience should prove to be necessary to the purpose of their institution. In 1780 the Chief Justice of the Supreme Court was appointed Judge of the Sudder Dewanny Adawlut, and was vested with all its powers. The Governor-General and Council, who previously formed that Adawlut, ceased to belong to it, but it was expressly stipulated that the Chief Justice should enjoy the office and salary at their pleasure. The Chief Justice, in fulfilment of the duties which devolved upon him by virtue of his new office, prepared a series of regulations for the guidance of the Civil Courts, which were afterwards incorporated in a revised Code passed in 1781.

In the same year, that is in 1781, the Sudder Dewanny Adawlut was constituted by Act of

* Mill's History of India, Vol. IV, p. 245.

1772 - 1908.

Parliament* a Court of Record. Although it was not established by Royal Charter, it was nevertheless distinguished from the ordinary Courts of the Company, and traced its final establishment to the recognition and sanction of the Imperial Parliament. In the next year the Court of Directors sent out orders to the Governor-General in Council to resume the superintendence of that Court.

Re-union in 1787 of civil and revenue jurisdiction by Lord Cornwallis.

Lord Cornwallis came to India as Governor-General in 1786. Previous to his arrival, an Act of Parliament† had established a Board of Commissioners for the Affairs of India, and had directed enquiries to be made as to the grievances of the Natives. Lord Cornwallis brought with him instructions from the Court of Directors, dictated with a view to carry out the object of Parliament, which was, in the words of the Act, "to establish permanent rules for the settlement and collection of the revenue, and for the administration of justice founded on the ancient laws and local usages of the country".

He accordingly directed the re-union of the functions of civil and criminal justice with those of the collection and management of the revenue. He placed the Dewanny Adawluts under the superintendence of the Collectors; he resolved in Council to resume the superintendence of the administration of criminal justice throughout the provinces; and after a few years removed to Calcutta the Nizamut Adawlut which had been, during the time of Warren Hastings, transferred to Moorshedabad. Although the functions of civil justice and of the collection of the revenue were re-united in the person of the Collectors, the Courts

* 21 Geo. III, c. 70, s. 71.
† 24 Geo. III, c. 25.

CHAPTER VIII.

over which they presided were kept distinct. Lord Cornwallis's policy, apparently, was to revive the institutions which had been framed in pursuance of the scheme of 1772 and to carry out the intentions of Warren Hastings before the changes made by the Council led to the adoption of a different system.

Changes in the Courts to effect that object.

It was in* the year 1787 that it was resolved, in obedience to the Court of Directors, that the office of Judge of the several Mofussil Courts (except those which were established in the cities of Patna, Moorshedabad, and Dacca) should be held by the person who had charge of the revenue; and in the same year a revised code of judicial regulations adapted to this change of system was published. All revenue cases were by this code assigned to the Collector, from whom an appeal lay to the Board of Revenue, and ultimately to the Governor-General in Council. The object of thus reverting to the system which had been discontinued in 1780 was to accustom the Natives to look to one master. It was considered impossible, after the experience of seven years, to draw a line between the revenue and judicial departments in such a manner as to prevent their clashing. The then existing regulations had endeavoured to do so, but constant confusion was the result.

Second separation in 1793 of civil and revenue jurisdiction.

But then came a third change of policy.† In a minute of Lord Cornwallis, published in 1793, he said :—"There is no class of men which Government should watch with greater jealousy, and on whom the regulations should have a stricter control, than the officers who are entrusted with the collection of the public

* Harrington's Analysis, Vol. I, p. 32.

† Harrington's Analysis, Vol. I, p. 42.

revenue. It is necessary to arm them with power to enforce their demands, * * *; but to prevent the abuse of this power, there should be Courts of Justice ready to punish oppression and exaction". The experience of six years induced Lord Cornwallis to return to the system of separation of the fiscal and judicial systems which he found in existence on his arrival. 1772—1908.

Accordingly in the same year he established a complete system of judicature throughout the Presidency of Bengal, and formed the existing regulations into a regular code. The chief feature of the new system was the abolition of the Revenue Courts and the transference of all causes hitherto tried by the revenue officers to the Civil Courts; thus entirely separating the collection of revenue from the administration of justice, which were thenceforth confided to separate offices. "All questions", said the preamble to the reglation* which carried out this policy, "between Government and the landholders respecting the assessment and collection of the public revenue and disputed claims between the latter and their ryots, or other persons concerned in the collection of their rents have hitherto been cognizable in the Courts of Maal Adawlut, or Revenue Courts. The Collectors of the Revenue preside in these Courts as Judges, and an appeal lies from their decision to the Board of Revenue and from the decrees of that Board to the Governor-General in Council in the department of revenue.

Reasons for that separation.

"The proprietors can never consider the privileges which have been conferred upon them as secure whilst the revenue officers are vested with these judicial powers. Exclusive of the objections arising to these Courts from their irregular, summary and often *ex parte*

---

* Reg. II of 1793.

CHAPTER VIII.

proceedings, and from the Collectors being obliged to suspend the exercise of their judicial functions whenever they interfere with their financial duties, it is obvious that, if the regulations for assessing and collecting the public revenue are infringed, the revenue officers themselves must be the aggressors, and that individuals who have been wronged by them in one capacity can never hope to obtain redress from them in another. Their financial occupations equally disqualify them for administering the laws between the proprietors of land and their tenants.

"Other security, therefore, must be given to landed property and to the rights attached to it, before the desired improvements in agriculture can be expected to be effected. Government must divest itself of the power of infringing in its executive capacity the rights and privileges which, as exercising the legislative authority, it has conferred on the landholders. The revenue officers must be deprived of their judicial powers. All financial claims of the public, when disputed under the regulations, must be subjected to the cognizance of Courts of Judicature, superintended by Judges who, from their official situations and the nature of their trusts, shall not only be wholly uninterested in the result of their decisions, but bound to decide impartially between the public and the proprietors of land, and also between the latter and their tenants. The Collectors of the Revenue must not only be divested of the power of deciding upon their own acts, but rendered amenable for them to the Courts of Judicature, and must collect the public dues subject to a personal prosecution for every exaction exceeding the amount which they are authorized to demand on behalf of the public and for every deviation from the regulations prescribed for the collection of it".

It must be admitted that this preamble lays down a sound and reasonable policy, founded upon strict justice, necessary for the due preservation and security of what are called landed interests. But although that policy was immediately carried out by Lord Cornwallis, constant attempts were successfully made in the interests of the Executive to depart from it in later times. In 1831 we shall find that those jurisdictions were again united, and that, later on, Act X of 1859 was passed which directly violated the principles and policy laid down in the preamble to that famous regulation. 1772—1908.

Duties of Collectors.

The Collectors were thenceforth entrusted with the collection of the revenue payable to Government as executive officers subordinate to the Board of Revenue. The nature of their duties was described in Section 8, Regulation II of 1793.

Re-organization of Civil Courts.

Having thus confined the Collectors to their exclusively executive functions, the next step was to re-organize the Courts of Justice and render them efficient and independent. Accordingly, by the next regulation,* Government, in the language of its preamble divested itself "of the power of interfering in the administration of the laws and regulations in the first instance, reserving only as a Court of Appeal or Review the decision of certain cases in the last resort"; and lodged its judicial authority in Courts of Justice.

Sudder Dewanny Adawlut.

By Regulation VI of 1793, the Sudder Dewanny Adawlut was re-established at the Presidency, and consisted of the Governor-General and the other members of the Supreme Council. It received appeals from the provincial Courts and Councils and from the

* Reg. III of 1793.

CHAPTER VIII.

Board of Revenue. In 1801, it was made to consist of three Judges, appointed by the Governor-General, the chief being also a member of the Supreme Council, the other two being selected from the covenanted servants of the Company*; and in 1811 (*see* Regulation XII) of a Chief Judge and as many Puisne Judges as the Governor-General in Council should think necessary. The powers and duties of the Court were defined by the Regulations of 1793 and 1801; and were extended by later legislation over Benares and the Ceded Provinces.†

In 1831 a Sudder‡ Dewanny Adawlut was constituted for the North-Western Provinces with similar powers.

Provincial Courts of Appeal.

Four Provincial Courts of Appeal were established (Regulation V of 1793) within the provinces of Bengal, Behar, and Orissa for the purpose of hearing appeals from the several zillah and city Courts next mentioned; the Sudder Dewanny Adawlut being vested with appellate jurisdiction and general power of supervision over the inferior Courts in all suits above Rs. 1,000. By later regulations two more Provincial Courts were established; one for the province of Benares, and one for the Ceded Provinces.

Courts of Dewanny Adawlut.

Courts of Dewanny Adawlut for the trial of civil suits in the first instance were by Regulation III of 1793 established in twenty-three zillahs and three cities. It defined their jurisdiction, and directed the Judges of those Courts to act when no specific rule existed according to justice, equity, and good conscience; while Regulation IV prescribed their procedure. In 1795 and 1803 similar Courts were established in the Benares

* Reg. II of 1801.
† See Reg. X of 1795 and V of 1803.
‡ Reg. VI of 1831.

and Ceded Provinces. These regulations were all repealed by Act X of 1861. The Provincial Courts themselves were abolished in pursuance of Regulation II of 1833. 1772—1908.

Below the city and zillah Courts were two classes of inferior Judges. First in order, were the Registrars of those Courts who could decide causes for amounts not exceeding Rs. 200, subject to revision by the Judge. The next and lowest grade of Judges were the Native Commissioners who, under Regulation XL of 1793, could decide civil suits for sums of money or personal property of a value not exceeding 50 Sicca rupees. Of these officers, the head Commissioners were called Sudder Ameens, and the rest were called Moonsiffs. Lower grades of Judges.

This was the general outline of the new system which was established for the administration of civil justice. The year 1793 marks the era of independence in that administration. The Government endeavoured to separate between their judicial and executive functions and to render the officers who performed the latter functions amenable to the authority of those who exercised the former duties. The Courts so established lasted most of them for a considerable space of time, nearly eighty years, but by the process of occasional extension and repeal the statutory provisions which created them were enveloped in some obscurity.

Some alterations in detail were made during subsequent years. Regulation XXIII of 1814 consolidated the several rules which had been passed regarding the office of the Native Commissioners; modified and extended their powers in the trial and decision of civil suits; authorized the Judges of the zillah and city Courts to employ them in the execution of certain additional duties; and transferred to the provincial

CHAPTER VIII.

Courts the control over their appointment and removal which had been formerly exercised by the Sudder Dewanny Adawlut.

Changes in the Civil Courts in 1831.

At length, in 1831, Regulation V of that year made some important alterations. The object was recited in the preamble to be the gradual introduction of respectable Natives into the more important trusts connected with the administration of the country. Moonsiffs were invested with power to try and determine suits for money and other personal property of the value of Rs. 300, suits with regard to land of the value of Rs. 300, except such land as was exempt from the payment of revenue. The Judges were empowered to refer to the Sudder Ameens any suits which did not exceed Rs. 1,000. Principal Sudder Ameens were also authorized to be appointed, to whom suits might be referred not exceeding Rs. 5,000. Registrars' Courts were abolished ; provincial Courts of Appeal were gradually superseded, and in two years finally abolished ; and original jurisdiction was given to the Judges in all suits exceeding in value Rs. 5,000, with an appeal direct to the Sudder Dewanny Adawlut. All the procedure provisions contained in these and preceding regulations were repealed, and one general code upon that subject was first established by Act VIII of 1859.

Gradual recovery by Collectors of jurisdiction in rent cases.

During this time, that is in the period which intervened between 1793 and 1831, the relations of the Collectors to the Civil Courts underwent considerable alterations.

The system of 1793, which, to all appearance, had finally severed the work of administering justice from that of collecting revenue, had provided,* in order to

* See Reg. XIII of 1793.

ensure expedition, that the Judges of the zillah and city Courts might refer petty suits to their Registrars, or as they came to be called in later times Sudder Ameens or Principal Sudder Ameens, as the case might be. Advantage was taken of this circumstance in the very next year to re-invest the revenue officers with some of the power which they had lost. It was the duty of the Judges to revise the orders of the Registrars, and to countersign them before they were considered to be valid. The work of revision was found to be as long as that of trying in the first instance. And so it was enacted by Regulation VIII of 1794 that the Courts might refer to the Collectors all cases which, before the new system, had been cognizable by them. The Collectors were thereupon bound to send in their report which the Judge might confirm or set aside, or he might make any order thereon that he might think fit. This was the commencement of a re-transfer to the Collectors of judicial functions, increased authority being required, as it was urged, to enable them to obtain payment of the Government revenue.

1772—1908.

First step.

In the next year, a summary procedure was provided for the determination of claims to arrears of rent. This was superseded by Regulation VII of 1799 which for a long time formed the basis of summary suit law. It was recited in that regulation that the powers of the landholders for enforcing payment of rents had been in some cases found insufficient, and that considerable delay had occurred in payment of Government revenue. It referred to the summary process of recovery given by Regulation XXXV of 1793, and enacted several rules in lieu thereof. It enforced the strictest observance of the rule laid down in Regulation VII of 1793, that the Civil Courts were to give priority to rent and revenue cases. They

Second step.

CHAPTER VIII.

were still authorized to refer cases for report to the Collectors, and afterwards to adjudicate upon them. The object of the regulation was to enable landed proprietors to realize their rents speedily, with a view to punctual payment of Government revenue.

Again, in 1812,* a summary remedy was given to the ryot against his landlord in all cases in which he was aggrieved by distress for rent. The cognizance of such cases was also practically vested in the Collector, to whom they were ordered to be referred.

Third step.

And in 1824, about thirty years after Lord Cornwallis' policy had been carried into effect, an important regulation† was passed, which recited that the provisions contained in the regulations then in force empowering the Judges of the zillah and city Courts to refer accounts and summary suits to the Collectors for report, had been found insufficient to expedite trials. It was considered by the Legislature to be indispensable to the attainment of that object that the revenue officers should be vested with authority to hear, investigate, and determine by a summary process, and subject to a regular suit in the Civil Court, all rent suits which might be referred to them by the Judges. Rules were enacted in this regulation for their guidance, and the same powers were given to them as were vested in the Civil Courts, for compelling the attendance and the examination of witnesses, and generally for all process except execution of their decrees, which was confided to the Civil Courts.

Collectors given exclusive jurisdiction in rent cases in 1831.

This was followed in 1831 by another regulation, which deprived the Judges of all jurisdiction over summary suits relating to rent, and transferred them

---

* See Reg. V of 1812.
† Reg. XIV of 1824.

to the exclusive cognizance of the Collectors, whose decisions were to be final, subject to a regular suit which was to be brought in the Civil Court. The Commissioner could revise the decision of the Collectors solely on the ground of the case not being of a nature cognizable as a summary suit. 1772—1908.

Thus in 1831 rent and revenue cases were again transferred to the Collectors, in order to facilitate the collection of Government revenue. No rules, however, for conducting the summary inquiry, either before the Civil Courts or before the Collectors, had ever been laid down. Considerable oppression resulted from this state of things, the tenants not being sufficiently protected from the landlord, and the landlord not being sufficiently protected from the Collectors.

Further extension of the Collector's jurisdiction.

In 1857 a Bill was introduced into the Legislative Council of India, with a view to enlarge and define the jurisdiction of the Collectors, with respect to summary suits for arrears or exactions of rent, and generally with respect to the law regulating the relations of landlord and tenant. The Collector was considered to be the person most deeply interested in promoting this branch of the administration of civil justice, being best acquainted with the fiscal state of the district, with the tenures prevailing in it, and with the character of the landlords. The Bill gave to the revenue officers exclusively the primary cognizance of all cases of ejectment, cancelment of leases for arrears of rent, enhancement of rent, and right of demanding pottahs and kubooleuts.

As the law stood before that Bill, the Civil Courts, and not the revenue officers, had jurisdiction to try suits for the delivery of pottahs or kubooleuts, or for the determination of the rates of rent at which such

CHAPTER VIII.

pottahs or kubooleuts ought to be delivered, and also over all suits in ejectment, or to cancel a lease for non-payment of rent, or for breach of conditions of any contract involving a liability to ejectment or cancelment of a lease. Collectors and Deputy Collectors, therefore, it was proposed should acquire a still greater portion of the jurisdiction of the Civil Courts than they had previously obtained under the Regulations of 1824 and 1831.

Suits cognizable by the Collectors under Act X of 1859.

The Bill became law in 1859, being Act X in that year passed by the Governor-General in Council. It provided in the 23rd Section that the following suits should be cognizable by the Collectors of Land Revenue and should be instituted and tried under the provisions of that Act, and except in the way of appeal as therein provided, should not be cognizable in any other Court or by any other officer, or in any other manner * :—

(1) All suits for the delivery of pottahs or kubooleuts, or for the determination of the rates of rent at which such pottahs or kubooleuts are to be delivered.

(2) All suits for damages on account of the illegal exaction of rent, or of any unauthorized cess or impost or on account of the refusal of receipts for rent paid or on account of the extortion of rent by confinement or other duress.

(3) All complaints of excess in demand of rent and all claims to abatement of rent.

(4) All suits for arrears of rent due on account of land either kherajee or lakheraj, or on account of any rights of pasturage, forest rights, fisheries, or the like.

(5) All suits to eject any ryot, or to cancel any lease on account of the non-payment of arrears of rent

---

* Section 23.

or on account of a breach of the conditions of any contract by which a ryot may be liable to ejectment, or a lease may be liable to be cancelled. 1772—1908.

(6) All suits to recover the occupancy or possession of any land, farm or tenure, from which a ryot, farmer or tenant has been illegally ejected by the person entitled to receive rent for the same.

(7) All suits arising out of the exercise of the power of distraint conferred on zemindars and others by the Act,* or out of any acts done under colour of the exercise of the said power as hereinafter particularly provided.

(8) All suits by zemindars and others in receipt of the rent of land against any agents employed by them in the management of land, or collection of rents, or the sureties of such agents for money received, or accounts kept by such agents in the course of such employment or for papers in their possession.

Control over the Collectors.

In the performance of their duties under the Act the Collectors and Deputy Collectors, so far as these latter were vested with any powers thereunder, were rendered subject to the general direction and control of the Commissioners and the Boards of Revenue. And the Deputy Collectors were placed under the direction and control of the Collectors to whom they were subordinate. Appeals were allowed in certain cases from the Deputy Collector to the Collector, and from the Collector to the Commissioner. Orders passed in appeal by a Commissioner or a Collector were not open to any further appeal, but the Board of Revenue or the Commissioner might call for any case, and pass such orders thereupon as they might think fit. A Collector's decree was not appealable if for money below Rs. 100.

* See Sections 112 and 114.

Chapter VIII.

unless the decision involved some question of right to enhance rents or some question relating to a title to land.

Opposition to the passing of Act X of 1859.

Mr. Peacock strongly opposed the passing of the 23rd Section, which took away the jurisdiction of the Civil Court, and transferred so many suits to the exclusive cognizance of the revenue officers. He objected to abolishing the jurisdiction of the Civil Courts, and also to the competency of the revenue officers to exercise this new jurisdiction, and he pointed out that the object of Regulation VIII of 1831 appeared to be to encourage regular suits in a Civil Court, rather than summary suits before a Collector when the law gave an option. Mr. Peacock and Sir Charles Jackson recorded their dissent from the Bill, on the ground that it invested the revenue authorities with power to try the suits between landlord and tenant, and deprived the regular Civil Courts of their jurisdiction, notwithstanding that the suits might involve difficult questions of law and fact.

Consequences of the Act.

The consequence of Act X of 1859 was found to be that cases involving difficult and intricate points of law, and concerning important interests in land, came on for adjudication before Collectors and their subordinates, and it soon appeared that such officers were thereby entrusted with work of more difficulty and responsibility than was suited to their official knowledge and experience.

Jurisdiction in rent cases conferred on Civil Courts for the third time.

In ten years from the date of that Act, notwithstanding the familiarity with that class of cases which time had brought to the Collectors and their deputies, the Bengal Legislative Council passed an Act (VIII of 1869) which authorized the transfer of the jurisdiction to hear and determine them back again to the Civil

Courts; which Courts were to accept the procedure of the Civil Procedure Code with a few modifications, such as the nature of the subject required. All suits which, under Act X of 1859, were triable by Collectors of Land Revenue, were under the later Act transferred to the cognizance of the Civil Courts. The Act took effect in those districts in the Lower Provinces of Bengal to which it was extended by order of the Governor-General published in the *Calcutta Gazette*. In districts so mentioned the jurisdiction of the Collectors to entertain civil suits, under Act X of 1859 and Bengal Act VI of 1862, ceased save as regards any suits or proceedings then pending before them; and it was enacted that all suits brought for any cause of action arising under either of those Acts, or under Act VIII of 1869, should be cognizable by the Civil Courts in those places according to their several jurisdictions. In 1885 the Bengal Tenancy Act was passed by the Governor-General of India in Council and repealed the whole of Act X of 1859 and Act VIII of 1869. Under the 13th Chapter of this Act the Civil Courts have jurisdiction in all matters between landlord and tenant; and the procedure and appeals in all rent suits are regulated thereby. Revenue Officers are however given jurisdiction under the 10th and 11th Chapters of the Act to determine disputes between landlords and tenants arising in the course of the preparation of records of rights, according to the procedure prescribed for Civil Courts. Appeals from their decisions lie to the superior Civil Courts in the District and ultimately to the High Court. **1772—1908.**

Act XVIII of 1873.

Act XVIII of 1873, however, which was passed for the North-West Provinces, though it repealed Act X of 1859, consolidated and amended that and its amending Acts, and preserved to the Revenue Courts

CHAPTER VIII.

their exclusive jurisdiction. Subsequently Act XII of 1881 pursued the same course. Settlement Officers continue to be, from time to time, in different parts of India, vested with civil jurisdiction in rent cases to the exclusion of the Civil Courts.

Further history of the Civil Courts.

Having thus traced the progress of rivalry between the Civil and Revenue Courts, it only remains to state that the Adawlut system was revised and placed upon a definite footing by the Bengal Civil Courts Act of 1871, to be hereafter described in dealing with the existing judicial system. The course of legislation was found to have introduced considerable confusion as to the functions of the Judges and the constitution and jurisdiction of the Courts. In order to ascertain them it had become necessary to trace out and piece together various bits of legislation which were distributed over no less than thirteen different enactments. Mr. Fitzjames Stephen* thus in 1871 described the statutory basis of the existing Courts. First of all there were two regulations in 1793, large parts of which had been repealed and amended and re-amended; what remained of each defined the jurisdiction and procedure of the zillah Courts of Lower Bengal, Patna, Dacca, and Moorshedabad. Then with regard to the regulations of the later years, the unrepealed bits of them when discovered applied a similar system to other cities and to the provinces ceded by the Nawab Nazim of Bengal to the East India Company, and finally other enactments purported to extend the same system to the conquered provinces situated within the Doab and on the right bank of the Jumna, and to the territory ceded by the Peishwa. A prolonged course of reading

* Legislative Proceedings of the Governor-General's Council, 1871, p. 87.

1772—1908.

and of the examination and collation of different enactments was necessary before any man could discover what were the Courts that really existed in Bengal. The Legislature recognized the necessity of re-establishing them, and accordingly passed the Act of 1871.

Madras Courts.

In the Madras Presidency it appears that the Adawlut system, framed upon the plan of Lord Cornwallis adopted in Bengal, was introduced in the year 1802. The Civil and Revenue Courts were kept distinct. The Registrars had jurisdiction to try suits referred to them by the Judge. The Judges could decide finally in suits under 1,000 rupees in value. There were four provincial Courts of Appeal; and the Sudder Court consisted of the Governor in Council, with an appeal from him in suits of the value of 45,000 rupees to the Governor-General in Council. In 1806 the constitution of the Sudder Court was altered, and new Judges appointed.* And in 1807 the Governor was declared to be no longer a Judge.†

Inferior tribunals.

In 1816‡ a regulation was passed by the local Legislature, in pursuance of which heads of villages were appointed Moonsiffs, with power to try and finally determine suits not exceeding Rs. 10 in value. They were also authorized to assemble village punchayets for the adjudication of civil suits of any amount within their village jurisdictions, the majority to decide. Another regulation§ empowered the provincial Courts to annul the decision of the punchayets, and to refer to a second punchayet, whose decision, if it agreed with the former one, was to be final.

---

* Regulation IV of 1806.
† Regulation III of 1807.
‡ Regulation IV of 1816.
§ Regulation V of 1807.

CHAPTER VIII.

In 1843 the provincial Courts of Appeal were abolished.* New zillah Courts were established and the jurisdiction of the subordinate Judges and principal Sudder Ameens was increased so as to include all suits of less value than 10,000 rupees. Such Courts were to have jurisdiction over Europeans and Americans as well as Natives, and an appeal lay from them to the zillah Judges. Eventually Act III of 1873 established, as will be hereafter described, a system of Courts similar to those planted in Bengal by Act VI of 1871.

Bombay Courts.

With regard to the Adawlut system in the Bombay Presidency, it appears that the Court of Directors in 1794 transmitted to the Government of that Presidency a copy of the regulations proposed by Lord Cornwallis for the internal government of the Bengal provinces; and eventually, Courts of Civil and Criminal Judicature were constituted by the Bombay Government on principles similar to those on which the Courts in the Presidency of Bengal had been established. In 1827 all the Bombay regulations passed previously to that year, with few exceptions, were rescinded, and a new code was established by which the system of judicature was entirely remodelled, based however upon the Bengal Regulations of 1793. In 1845 the appointment of joint zillah Judges, whenever the state of civil business required it, was authorized.†

The Civil Courts of Bombay, as they continued to exist for a considerable space of time, were constituted by regulations passed in the first seven years after the Revised Code of 1827 which enacted such modifications of the original system as experience suggested. Those regulations in turn were subjected to a constant process

---

* Act VII of 1843.

† Act XXIX of 1845.

of partial repeal till the law and constitution of the Courts in Bombay as in Bengal were placed in a most unsatisfactory state. Act XIV of 1869 was eventually passed, and constituted the Civil Courts of Bombay in a manner which shall be hereafter explained. 1772—1908.

Revenue jurisdiction in both Presidencies.

It appears that both in Madras and Bombay the revenue officers had the power of trying all rent suits. From their decisions the appeal lay in the former Presidency to the zillah Courts; in the latter to the Sudder Court. In 1866 the local Legislature at Bombay passed an Act* to divest the Courts of Revenue of jurisdiction in cases relating to the rent of land and the use of wells, tanks, watercourses, and roads to fields, and to vest such jurisdiction in the Civil Courts.

General Codes of Civil Procedure and Evidence.

A general Code of Civil Procedure was first enacted in 1859†. This Code, Act VIII of 1859, was subsequently replaced by Act XIV of 1882 and later by Act V of 1908 which is now in force. Subject to special provisions made for the exercise of special jurisdictions and special modes of procedure enacted for special kinds of proceedings, this Act now governs all proceedings in Civil Courts and proceedings in Revenue Courts also in so far as they have not been modified by executive notification. The executive government has power by similar exercise of authority to apply the Code or any parts of it with or without modifications in the Scheduled Districts. The law of evidence now applicable to both civil and criminal proceedings is Act I of 1872.

---

* Act II of 1866 (Bombay C.).

† See p. 178 *ante*.

CHAPTER IX.

LATER HISTORY—THE PROVINCIAL CRIMINAL COURTS.

Criminal Justice in early times—Sudder Nizamut Adawlut—Mahomedan law—Governor-General supersedes the Nawab Nazim—Police administration in early times—Scheme of Warren Hastings—Civil Judges appointed Magistrates—Further Measures—System of 1793—Sudder Nizamut Adawlut—Courts of Circuit—Abolished in 1829—Replaced by Commissioners of Revenue and Circuit—Criminal jurisdiction of Zillah Judges—Sessions Judges—Bengal Sessions Court Act of 1871—Act of 1872—Criminal Justice in Madras—Criminal Justice in Bombay—Sudder Nizamut for the North-West Provinces—Police in Bengal—Supervision of Police by Magistrates—Zillah Judges declared to be Magistrates—Police in Benares—Assimilated to Bengal—Police Officers—Darogahs—Mohurrahs—Jemadars—Watchers—Control by Commissioners of Circuit—Police in Madras—Police in Bombay—General condition of the Police—Sir Charles Napier's reform of it in Sind—North-West Provinces—Bombay and Punjab—Oudh—Madras—Act V of 1861.

Criminal Justice in early times.

THE scheme for the administration of criminal as well as of civil justice in Bengal is attributable to Warren Hastings. The principle originally adopted was to retain the Mahomedan law and law officers and Courts for the repression of crime, subject to the supervision, not apparently very close or effective, of the Government. A scheme of police was also prepared and carried into execution. But in the year 1793 the whole system of criminal and police, as well as of civil, administration was remodelled, by the light of the experience of twenty years.

It appears * that Criminal Courts, denominated Foujdary Adawluts, were first appointed in Bengal

* See Regulation IX of 1793, Preamble.

for the trial of persons charged with crimes or misdemeanours pursuant to the regulations passed by the President in Council in 1772. The Collectors of Revenue were directed to superintend the proceedings of the officers in those Courts, and on trials to see that the necessary witnesses were summoned and examined, that due weight was allowed to their testimony, and that the decisions passed were fair and impartial. **1772—1872.**

Sudder Nizamut Adawlut.

A Sudder Nizamut Adawlut was established at Moorshedabad under the superintendence of a Committee of Revenue for the purpose of revising the proceedings of the provincial Courts in capital cases. It was upon the abolition of that Committee that the Nizamut Adawlut was, for the first time, brought to Calcutta. The history of the provincial Criminal Courts down to the year 1775, when the Nizamut Adawlut was carried back to Moorshedabad, has already been described.* The Foujdary Adawluts, however, did not work successfully under the superintendence of the East India Company's Government; and the discharge of the duties entrusted to the Governor-General, as head of the Nizamut Adawlut or Supreme Penal Court of Calcutta, loaded him with a weight of business and of responsibility from† which he sought to be relieved. The majority of the Council took advantage of the circumstance to restore to Mahomed Reza Khan, the Mahomedan Dewan to whom I have frequently referred, the superintendence of penal justice and of the Criminal Courts throughout the country; and for that purpose, removed the seat of the Nizamut Adawlut from Calcutta back to Moorshedabad.

---

* See *ante*, pp. 29 to 31.

† Mill's History of India, Vol. III, p. 455.

CHAPTER IX.

Mahomedan law.

During the fifteen years which elapsed before the Nizamut was again restored to Calcutta, the course of the administration of criminal justice, apart from the jurisdiction of the Supreme Court, was that the Mahomedan tribunals administered Mahomedan law under the general control of the Nazim, but subject in each Court to the supervision of English authority.

Governor-General supersedes the Nawab Nazim.

In 1790, it was determined by Lord Cornwallis, with reference to the administration of criminal justice,* that "the future control of so important a branch of Government ought not to be left to the sole discretion of any native, or indeed of any single person whomsoever". That year is an important epoch in the history of this subject. By the regulations then passed, the powers of the Nawab Nazim passed to the Governor-General in Council, and the system of criminal justice was entirely remodelled.

Police administration in early times.

Before proceeding to explain the nature of the system then established, it will be necessary to describe the scheme of police administration which had been in force. Originally the zemindars appear to have been the persons who were responsible for† the public safety and the maintenance of the public roads.‡ There was a clause in the engagement of these landholders and farmers of land by which they were bound to keep the peace; and in the event of any robbery being committed on their respective estates or farms, to produce both the robbers and the property plundered. In 1772, however, the Foujdary jurisdiction of the zemindars was transferred to the Adawluts; for

---

* Beaufort's Criminal Digest, p. 10.

† See Preamble to Regulation XXII of 1793.

‡ See Bengal Council Legislative Proceedings, Vol. V, 1871, p. 142, Speech of the Lieutenant-Governor.

chakaran land had been resumed, and collusion was constantly proved or suspected between the perpetrators of offences and the officers who were maintained by the holders of land. 1772—1872.

Scheme of Warren Hastings.

Accordingly a general system of police became one of the greatest wants of the country, and Mr. Hastings in 1774 divided Bengal for purposes of police into fourteen different districts. Thannadars were appointed over them, landholders were enjoined to assist, chakaran lands were again applied to their original design; and Foujdars were appointed to apprehend all offenders against the public peace. This system proved a failure, and lasted a very few years.

Civil Judges appointed Magistrates.

In 1781 the Foujdars and their subordinate thannadars were abolished, and the Judges of the Civil Courts were invested with the power, as Magistrates, of apprehending and bringing to trial offenders in their districts. Their duty was to forward them to the Darogah of the nearest Criminal Court; the power of punishment still resting with the Nabob's Court. The zemindar, by special permission of the Governor-General in Council, was sometimes vested with a similar power.

Further measures.

Subsequently the Civil Judges were vested with authority to hear and decide complaints of slight offences, and under certain restrictions to inflict corporal punishment, and impose fines on offenders. And in order to afford the Government some oversight and control over the penal jurisdiction of the country, a new office* was established at the Presidency under the immediate superintendence of the Governor-General. To this office reports of proceedings, with lists of

* Regulation IX of 1793, ss. 31, 33 and 36.

CHAPTER IX.

commitments and convictions, were transmitted, every month, and an officer under the Governor-General, with the title of *Remembrancer to the Criminal Courts*, was appointed for the transaction of its affairs. "But* the numerous robberies, murders, and other enormities, which continued to be daily committed throughout the country, evinced that the administration of criminal justice was in a very defective state; and as these evils appeared to result principally from the great delay which occurred in bringing offenders to punishment and to the law not being duly enforced, as well as to other material defects in the constitution of the Criminal Courts; and as it was essential for the prevention of crimes not only that offenders should be deprived of the means of eluding the pursuit of the officers of justice, but that they should be speedily and impartially tried when apprehended, the Governor-General in Council passed certain regulations on the 3rd December, 1790, establishing Courts of Circuit under the superintendence of English Judges, assisted by Natives versed in the Mahomedan law, for trying in the first instance persons charged with crimes or misdemeanours, and enabling the Governor-General and the Members of the Supreme Council to sit in the Nizamut Adawlut (which was for that purpose again removed to Calcutta), and superintend the administration of criminal justice throughout the provinces". The regulations so passed in 1790 were, with amendments and alterations, re-enacted in 1793.

System of 1793.

Thus in 1793 the whole criminal and police administration of the country was remodelled in pursuance of previous regulations. The authority of the Nabob Nazim was abolished, and the Governor-General and

---

* *Ibid.*, see Preamble.

Council formed the Sudder Nizamut Adawlut, having general control over the Criminal Courts. 1772—1872.

Sudder Nizamut Adawlut.

By Regulation II of 1801, the Court of Nizamut Adawlut, as well as that of Dewanny Adawlut, which had up to that time consisted of the Governor-General and the Members of Council, was directed to be composed of a Chief Judge and Puisne Judges*; and from that time both Courts exercised their functions distinct from the legislative and executive authority of the State. The proceedings of those Courts were not required from that time to be kept in English farther than the Courts might find convenient and conducive to regularity; nor were copies of the proceedings of either Court to be thereafter required, except in cases of appeal to His Majesty in Council, or of reference to the Governor-General in Council. In later years the number of Judges was increased, as in the Sudder Dewanny Adawlut.†

Courts of Circuit.

Next in rank to the Nizamut Adawlut came four Courts of Circuit, subsequently increased in number as other provinces were added to the Presidency. Each Court was composed of the same Judges who sat in the provincial Civil Court of Appeal, and of the Cazee, and Mooftee, attached thereto. The duties of the Court of Circuit, including the gaol deliveries at the principal stations, were in ordinary cases performed by the second, third, and fourth Judge, in regular succession, the first Judge remaining at the principal station, unless otherwise ordered to conduct the public business.

---

* They were assisted by the head Cazee of Bengal, Behar, Orissa and Benares. For this officer, see Reg. IX of 1793, Sec. 67, Reg. XXXIX of 1793, and Reg. XLIX of 1795, which extended his jurisdiction to Benares. See further Reg. VIII of 1809, which provided for the abolition of the office of Cazee.

† Reg. XII of 1811.

CHAPTER IX.

Abolished in 1829.

These Courts of Circuit continued to exist till the year 1829, when they were abolished by Regulation I of that year. They were considered to have failed to afford prompt administration of justice.

Replaced by Commissioners of Revenue and Circuit.

Accordingly, in that year, Bengal was divided into twenty divisions under twenty Commissioners of Revenue and Circuit, who were entrusted with the powers formerly vested in the Courts of Circuit, together with those belonging to the Board of Revenue; the former to be exercised under the authority of the Nizamut Adawlut, the latter under the control of a Sudder Board of Revenue. The Governor-General in Council was empowered to direct any Commissioner or Judge to hold the sessions of gaol delivery for any city or zillah, with the powers and authority of any Court of Circuit. Commissioners thus became the Criminal Judges in all cases of importance. Two years afterwards it was found that the labours cast upon the Commissioners were too heavy.

Criminal jurisdiction of zillah Judges.

Thereupon in the year 1831* the Magistrates were authorized to refer to the native officers, that is the Sudder Ameens, any criminal case for investigation, although such Ameens were not authorized to make any commitment. By another regulation of that year,† zillah and city Judges not being Magistrates were empowered, when ordered by the Governor-General in Council, to conduct the duties of the sessions, to try commitments made by Magistrates, and to hold gaol deliveries for each district at least once in every month. Thus the Criminal Judges of the country were first the Commissioners of Division, secondly, any Civil Judge whom the Governor-General might temporarily

---

* Regulation V of 1831.
† Regulation VII of 1831.

appoint to hold sessions under the Regulation of 1829, or might generally invest with criminal jurisdiction under the Regulation of 1831. 1772—1872.

In 1832 it was considered desirable to enable the European functionaries who presided in the Courts for the administration of criminal or civil justice, to avail themselves of the assistance of respectable natives in the decision of suits, or in the conduct of trials which might come before them. Provision was accordingly made* for referring suits to a panchayet, or for constituting assessors to assist the Judge, the decision however being vested exclusively in the officer presiding in Court.

Sessions Judges.

The practice which grew up under this state of the law was for the local Governments to appoint particular persons to be "District and Sessions Judges".† There are several passages in the Regulation of 1831 and in Act VII of 1835 which assumed the existence of such a functionary as a Sessions Judge; but there was no express legislative authority for his existence, nor for the power of the local Governments to appoint him. In the Criminal Procedure Code of 1861 reference is made to a Court of Session, but in Bengal and the North-Western Provinces, the powers which the Sessions Judges assumed to exercise were derived from the old Courts of Circuit. Neither in Madras nor in Bombay were the Sessions Judges directly connected by law with the Court of Session referred to in the Code of Criminal Procedure. The practice of appointing separate persons to be District and Sessions Judges was for a long space of time utterly without authority.

* Regulation VI of 1832.

† Legislative Proceedings, 1871, p. 534; Speech of Mr. Fitzjames Stephen.

CHAPTER IX.

But it continued after the repeal in 1868 of the Regulation of 1831 and Act VII of 1835, to which apparently it traced its existence. After that repeal the only law under which a Sessions Judge could be appointed was the Regulation of 1829, which authorized an occasional transference of a Judge to criminal work.

Bengal Sessions Courts Act of 1871.

It was under this state of things that Mr. Fitzjames Stephen introduced into the Legislative Council the Bengal Sessions Courts Act of 1871. The Act provided for the appointment of Sessions Judges and Additional Sessions Judges by the local Governments in Bengal and the North-Western Provinces. It confirmed the existing appointments, invested the Judges appointed with the character of Courts of Session within the meaning of the Code of Criminal Procedure; it authorized the Lieutenant-Governors to define and vary the local limits of their jurisdiction; it confirmed all proceedings by the existing Judges, and indemnified them against the consequences of acting without authority.

The Act was merely a temporary measure, passed in order to give a legal jurisdiction and existence to the Superior Courts of Criminal Justice which had previously been wanting. It was repealed in 1872, the Criminal Procedure Code of that year constituting all the Criminal Courts of the country.

Act of 1872.

Criminal justice in Madras.

In the Presidency of Madras a system of administration of criminal justice was introduced in 1802 during the government of Lord Clive's son, framed upon the system which prevailed in Bengal. Magistrates and Assistant Magistrates were appointed, with power to apprehend, bring to trial, and in light cases to inflict petty punishment. Four Courts of Circuit were established, and a Chief Criminal Court consisting of the Governor and Council.

The system so introduced was afterwards modified and altered. In 1827 Assistant Judges were appointed under Regulation I of that year, and then* were constituted joint criminal Judges of their zillahs. Native criminal Judges were appointed in that year, without jurisdiction over Europeans and Americans, and were afterwards called Principal Sudder Ameens. Trial by jury was ordered to be gradually introduced.† 1772—1872.

The Madras Courts of Circuit were abolished in 1845, and the Judges of zillah Courts were directed to hold permanent Sessions for trial of persons accused of crimes formerly triable by Courts of Circuit. Natives might be called in to assist either as assessors or as a jury.

Criminal justice in Bombay.

With regard to the Presidency of Bombay, the Governor-General in Council in 1797 authorized the local Government to establish Courts of Civil and Criminal Judicature in the Western Presidency, on principles similar to those on which the Courts in the Bengal Presidency had been established. As respects the administration of criminal justice, Mahomedan law did not generally prevail in the Presidency of Bombay. Hindus were tried by their own criminal law, Parsis and Christians by English law. Judges' and Magistrates' Courts and Courts of Session were established, and the Governor in Council had a right of supervision and control, an appellate jurisdiction and a power of granting pardon or mitigation of punishment.

In 1827 the Code was passed, revising former regulations, and establishing the basis of the whole

* Madras Regulation II of 1827.
† Madras Regulation X of 1827.

CHAPTER IX.

judicial and police system of Bombay. Magistrates and police officers apprehended offenders and punished for slight offences. Zillah Judges and assistant zillah Judges exercised criminal jurisdiction; the Court of Circuit, held by one of the Foujdary Adawlut Judges, retaining cognizance of the most heinous crimes. A special Court was also established for the trial of political offences consisting of three Judges selected from those of the Sudder Foujdary Adawlut and the zillah Courts. All those Criminal Courts were authorized to call in the assistance of Natives, and the law which they administered was set forth in a regulation* defining offences and specifying punishments.

In 1830 the Provincial Court of Circuit was abolished, and the Criminal Judges were vested with the powers of Sessions Judges and Courts of Circuit. Joint Sessions Judges were appointed under Act XXIX of 1845.

In 1827 appeals from the special Court for the trial of political offences which formerly lay to the Governor in Council were transferred to the Foujdary Adawlut, whose order therein was subject to the confirmation of the Government. And in 1841 it was enacted that crimes against the State should be cognizable by the ordinary tribunals.

Sudder Nizamut for the North-West Provinces.

A Court of Nizamut Adawlut was constituted for the North-West Provinces by Regulation VI of 1831, possessing the same powers as were vested in the Nizamut Adawlut in Calcutta.

Police in Bengal.

Then, with regard to the administration of police, it was in 1793, at about the same time as the Courts of Circuit were established, placed under the exclusive

* Regulation XIV of 1827.

charge of officers appointed to the superintendence of it on the part of Government. The landholders and farmers of land, who were bound to keep up establishments of thannadars and police officers for the preservation of the peace, were required to discharge them, and were prohibited from entertaining such establishments in future. They were relieved of responsibility for robberies committed on their estates, unless connivance were proved, or unless they omitted to assist the police. 1772—1872.

Supervision of police by Magistrates.

The Magistrates divided their zillahs into police jurisdictions, each of which was guarded by a Darogah or Superintendent, with an establishment of officers. The Magistrates appointed Darogahs, and were held responsible for selecting persons duly qualified for the trust. The police officers were directed to apprehend and send to the Magistrates all persons charged with crimes and misdemeanours and vagrants. The Magistrates and police officers of the cities were invested with concurrent authority in their respective jurisdictions. The cities were divided into wards, and guarded by Darogahs, who were subject to the authority of the Kutwals of each city.

Zillah Judges declared to be Magistrates.

Further, the Judges of all the zillahs and city Courts were declared to be Magistrates of the zillah or city under their respective jurisdictions, and the public gaols were placed under their charge. Shortly afterwards, assistants were appointed to the Magistrates with a limited occasional exercise of judicial powers. In 1807 the Magistrates were given an extended jurisdiction, and in 1810* Government was authorized to appoint other persons, not being zillah or city Judges to exercise with them the office of Joint Magistrates.

---

* Regulation XVI of 1810.

CHAPTER IX.

In 1818* their jurisdiction was extended, and they were empowered to try offenders charged with burglary and theft, with a power of imprisonment for a term not exceeding two years.

Police in Benares.

Notwithstanding the introduction of this scheme of Government police, when Benares and other provinces were annexed, they were placed under the management of tehsildars, landowners, and farmers, who were made responsible for robberies committed within the limits of their estates, excepting night robberies on the open roads or in woods.† But in 1807 all those provinces were divided into police jurisdictions in a similar manner to that adopted throughout Bengal, Behar, and Orissa. A superintendent of police was first appointed in 1808, and from 1816, in addition to the management of the whole system of police being entrusted to their care, they were directed by Government to submit annual reports of all the police occurrences within their districts.

Assimilated to Bengal.

Police officers.

Various rules were, from time to time, enacted respecting the duties of the Darogahs and other subordinate officers of police; and in 1817 they were all reduced into one regulation,‡ the whole system being revised, without, however, introducing any material alteration. The relative rank and general functions of officers on the thannah establishments were defined as follows:—The Darogahs exercised a general control over the mohurrahs, jemadars, and burkundazes attached to their respective thannahs. It was declared to be the duty of a Darogah to conform to all instructions he might receive from the magistrate, to preserve the peace within the limits of his jurisdiction, and to

Darogahs.

* Regulation XII of 1818.

† Regulation XVII of 1795, Regulation XXXV of 1803, and Regulation IX of 1804.

‡ Regulation XX of 1817.

report to him all occurrences connected with the police, and to discover and apprehend offenders, to execute process, and obey all orders transmitted to him by the Magistrate. The Mohurrah was the second officer at the thannah, his duty being to preserve the records and write reports, and to exercise the powers of a Darogah in the absence of that functionary. The Jemadar was the third officer, and could exercise the powers of a Darogah in the absence of both the Darogah and the Mohurrah. His duty was to see that the burkundazes were in attendance at their posts properly armed, and that all prisoners and property brought to the thannah were duly guarded. He acted under the orders of the Darogah. The police officers generally were directed to obey the orders of the superintendents of police and of the Joint and Assistant Magistrates. Village watchmen were directed to be employed within the limits of the authority of the Darogahs, and to be subject to their orders. In those towns and villages where Darogahs were stationed, the duties of watching were performed jointly by the police officers and the village watchmen. The kutwals and police officers in cities and towns were to be guided by the regulation, so far as it was applicable to them.

1772—1872.

Mohurrahs.

Jemadars.

Watchers.

Control by Commissioners of Circuit.

In 1829, when the Courts of Circuit were abolished, the magistracy and the police were placed under the superintendence and control of Commissioners of Circuit, who replaced those Courts and succeeded to their powers. The office of superintendent of police was at the same time abolished,* and its duties were assumed by the Commissioners. In 1837, however, provision was made for re-appointing superintendents

* Regulation I of 1829.

CHAPTER IX.

of police, who thereupon were empowered to exercise the functions of the Commissioners.

Police in Madras.

No general system of police was introduced into Madras when the system of Criminal Administration was first established. The Native system was retained; village watchers everywhere existing under the superintendence of the headmen of the villages. In some places Darogahs and thannadars were appointed.

But in 1816 a regulation* was passed to organize a general system throughout the Presidency. Heads of villages, aided by village watchers, were to discharge the duties of policemen, i.e., except in trivial cases, arrest and forward accused persons to the tehsildar or police officer of the district. The tehsildar was the head of the police of the district. Zemindars could be invested with police authority. The Magistrates and their assistants were generally charged with the maintenance of peace.

Police in Bombay.

At the same time, a general system of police was established throughout the territories subject to the Bombay Government, by which the duties of police which had originally been confided to the Foujdars and thannadars, were transferred to the heads of villages, aided by watchers. The new system was framed on the same plan as that adopted in Madras in 1816. In 1820, a Sudder Foujdary Adawlut was established at Surat consisting of four Judges, empowered to take cognizance of all matters relating to criminal justice and the police, and to call for the proceedings of the Criminal Judges or zillah Magistrates. The Judges were directed to go on circuit.

By the Revised Code in 1827, the duties of the police were directed to be conducted by the Judge

* Regulation XI of 1816.

and Collector of each zillah, the district police officer, and the heads of villages. The Magistrates and their assistants were empowered to apprehend all persons charged with crimes or offences. **1772—1872.**

General Condition of the Police.

About the middle of this century the general condition of the police throughout the country attracted considerable attention from the Government.

For upwards of half a century, the Magistrate had been charged with the oversight of the police of his district; and as with the increase of business, Magistrates became judicial officers, with extended powers, they were little able to give the police the attention necessary to keep it efficient. Complaints* of their inefficiency and corruption became universal. Whether few or many in proportion to the population, the police was everywhere oppressive and corrupt, undisciplined and ill-supervised. The Magistrates were either inefficient superintendents of police, or if active as police officers, apt to be biased as Magistrates. The earliest attempts at reform were made in the Presidency Towns by appointing superintendents of police separate from the Magistrate, and appointing non-official Justices of the Peace, Native and European. The result everywhere demonstrated the soundness of the principle of the separation, whilst the Justices of the Peace discharged the duties entrusted to them in a very satisfactory manner.

Sir Charles Napier's reform of it in Sind.

The first real attempt to reform the Mofussil police was made in Sind by Sir Charles Napier. Immediately after the conquest of that province, he drew up a plan

* About the time of Lord Wm. Bentinck. See for an historical account of the Indian Police, the speech of Sir B. Frere introducing Act V of 1861 to the Legislative Council of India, from which this *résumé* is taken.

CHAPTER IX.

on the model of the Irish constabulary, of which the characteristics were separate organization, complete severance of police and judicial functions, complete subordination to the general government, and lastly, discipline, not in the nature of parade, but as far as was necessary to effective organization. Its introduction was received with great distrust by the civil officers, but the total suppression of organized violent crime which ensued, and the conduct and efficiency of the Sind police during the Mutiny, testified to the soundness of the measure.

N. W. Provinces.

Lord Ellenborough ordered its extension to the North-Western Provinces, and three police corps were raised to relieve the military of the civil duties previously performed by them. Lord Ellenborough, however, left India, and there the reform stopped.

Bombay and Punjab.

In 1847, Sir George Clerk, Governor of Bombay, visited Sind, and recognizing the value of the Sind police, commenced reforms on a similar principle in Bombay, and shortly afterwards Sir Henry Lawrence commenced the reorganization of the police of the Punjab on much the same plan.

The original plan was, however, departed from in many particulars, and a double system of police was created, viz., first, the employment of an unorganized body of burkundazes under the Deputy Commissioners as Magistrates; and, secondly, the formation of police corps under the Chief Commissioner, who did no real police work, but were employed on duties which had previously devolved on the regular army. The system, although very costly, was effective, and it was these police corps which so materially assisted Sir John Lawrence to hold the Punjab and retake Delhi. This Punjab police was the model for the police corps of the

North-Western Provinces since 1857, and also for the police corps which existed in Oudh before the Mutiny. 1772—1872.

Oudh.

In March 1858, Colonel Bruce submitted, by order of Sir R. Montgomery, a scheme on the Sind model for the police of Oudh, and raised a police force to aid in subduing the country. Three thousand cavalry and twelve thousand infantry took the field with Lord Clyde in 1858, and occupied the country as the army passed over it; and in 1859, the country being thoroughly subdued, Sir Robert Montgomery decided to make the police a purely civil body, separate from the military on the one hand, and from the judiciary on the other. This was done, and a constabulary organized for Lucknow on the model of the London police. The success of the measure was great and tranquillity complete, and great reductions were made in the extent and expenditure of the police and tehsil establishments.

Madras.

Attention was first drawn to the subject of police reform in Madras by the report of the Torture Commission, and the result was embodied in the Act passed by the Legislative Council in 1859. The Act had proved most successful in operation, and it struck at the root of one of the great curses of the country, the detention by the police of persons charged with offences often without warrant and for corrupt purposes.

Act V of 1861.

In August 1860, a Police Commission was appointed in order to secure economy and something like uniformity in matters connected with police. Their report was followed by a Bill being brought into the Legislative Council which subsequently became Act V of 1861.

Its object was to provide for the reorganization and regulation of police throughout India, that is to

CHAPTER IX.

say, in every place to which the Governor-General should by order extend its provisions. Under it the entire police establishment under a Local Government is enrolled as one police force; constituted and paid according to the order of the Local Government. The Local Government superintends it while its administration in each general police district is vested in an Inspector-General and his subordinate officers; and throughout the local jurisdiction of the Magistrate of a district it is vested in a District Superintendent and his subordinates, subject to the general control and direction of the Magistrate. The chief police officers may be invested with the powers of a Magistrate. Special police officers may be appointed for such time and within such limits as the Magistrate may think necessary.

The Act does not in any way interfere with the position and privileges of any hereditary or other village police officers, unless such officer shall be enrolled as a police officer under the Act, which cannot be done without his consent.

The duty of a police officer is promptly to obey and execute all orders and warrants lawfully issued to him by any competent authority; to collect and communicate intelligence affecting the public peace; to prevent the commission of offences and public nuisances; to detect and bring offenders to justice and to apprehend all persons whom he is legally authorized to apprehend, and for whose apprehension sufficient ground exists.

CHAPTER X.

THE PRIVY COUNCIL.

Introduction—History of the Privy Council—Nature of the present jurisdiction—Appeals from India—From the Supreme Court —From Bengal Sudder Court—From Madras and Bombay Sudder Courts—Fate of early appeals—Power of the Council to entertain appeals—Limited by Legislation—And by Charters —No appeals in cases of felony—Constitution of the Judicial Committee—Act of William the Fourth and subsequent amendments—Acts of the Governor-General in Council—Charters of the High Courts—Effect of the Reform Acts of 1935.

Introduction.

THE history of the Courts and legislative authorities in India has now been sufficiently outlined and the existing Legislatures described. An account of the existing judicial system at present established and in force will complete the subject under discussion.

The highest judicial authority enforced in India, to which all its Courts are ultimately subordinate, is that of the Sovereign in Council, in pursuance of judgments delivered by the Privy Council. Although that tribunal sits in London and exercises supreme appellate authority over other Courts besides those established in India, viz., the Courts of the Colonies and the Ecclesiastical Courts in England, yet some account of it is necessary to give a complete view of the Indian system.

History of the Privy Council.

It would require a very minute examination of English history to explain how the Sovereign as represented by the Privy Council on the one hand, and the House of Lords as a distinct branch of the Legislature on the other, became possessed of their respective judicial jurisdictions, dividing between them the ultimate control over the administration of justice

CHAPTER X.

What follows is a brief outline of that history, in so far as it is necessary to explain the circumstance of India being subject in respect of the ultimate appellate jurisdiction over it to the Sovereign in Council rather than to the House of Lords.

Even at the present day, the designation "Privy Council", it should be observed, can be claimed by two entirely distinct institutions, one of which is concerned entirely with the discharge of executive, and correlated legislative functions of a subordinate character, namely, the promulgation of "Orders in Council". It is the other institution,' concerned wholly with the discharge of judicial functions, which is the subject of this chapter. Those who discharge these varied functions bear, by appointment, the same title of Privy Councillors. But not all Privy Councillors, by reason of such appointment only, acquire the right to participate in all those functions. The exercise of the executive functions before mentioned is, by practice, confined to such Privy Councillors as for the time being are members of the Cabinet. The exercise of the judicial function is confined since 1833 to a Statutory Committee of the Council. That these two distinctly functioning bodies should still bear the same name is not an accident. They have, as indeed also the House of Lords (both the Upper House of the British Parliament and the judicial body which sit in that name to hear appeals from the Superior Courts of the United Kingdom), all had a common historic origin.

The institution which in course of time differentiated into these organs of Government, and others not requiring consideration in the present treatment, was the feudal Curia which the Norman Kings brought with them to England.

Quite early in the history of English institutions, the Curia separated into two bodies, (1) the *Magnum Concilium* and (2) the Curia Regis. The former was a large body available for consultation on fixed occasions by general summons. The Curia Regis on the other hand consisted of men in the King's immediate entourage, who were at call at all times to assist the King in the discharge of the various functions of government, legislative, administrative and judicial. The Courts of Common Law, which we soon find functioning as permanent courts of justice, really began working as panels of this smaller body. This smaller council, which was the King's Privy Council, later threw off another judicial organ, the Court of Chancery, presided over by the King's Lord High Chancellor, whom the necessity of the times forced to take up the position as the Keeper, in a special manner, of the King's Conscience. The residue of the Privy Council, afforced when need arose by the judges, continued to discharge without question the non-judicial functions of the Council, though they were by no means averse to assuming judicial functions, as the history of the Court of Star Chamber and other like prerogative courts shows. **1200—1936.**

Since the Privy Council as a whole was in theory at least a panel or organ of the Great Council, appeals from the decisions of the Common Law and Chancery Courts naturally lay to the Great Council which meanwhile, through the accretion upon it of the House of Commons, came to form the Upper House of the Great Council of Parliament. The activities of the Prerogative Courts of later days, which claimed co-ordinate jurisdiction with the House of Lords in their own spheres, do not appear to have been viewed with favour at any time by the latter body. The misuse of these

CHAPTER X.

Courts for political purposes in the time of the Stuarts led to their abrogation. But the jurisdiction which the Privy Council had already been exercising of hearing appeals from the American colonies (which were treated as parts of the Royal demesne) never came to be questioned, and continued to be exercised over the colonies and dependencies after the restoration, and was extended by Royal Charters, Orders in Council and Statutes, without question or hindrance, upon every fresh acquisition of territory by or on behalf of the Crown. The position at the present moment has been summarised in *Strickland* v. *Graves*, [1926] A. C. 285, in the following terms: As His Majesty the King is supreme over all persons and Courts within his Dominion, a right of appeal in all cases civil and criminal exists from the highest courts in each separate Dominion, Colony, Province, State or Possession except in so far as the prerogative in this behalf has been surrendered.

The extent and importance of the jurisdiction still retained by the Privy Council were pointed out by Lord Brougham* in his celebrated speech on Law Reform as early as 1828:—

Nature of the present jurisdiction.

"They determine", he said, "not only upon questions of colonial law in plantation cases, but also sit as Judges, in the last resort, of all prize causes. And they hear and decide upon all our plantation appeals. They are thus made the supreme Judges, in the last resort, over every one of our foreign settlements, whether situated in those immense territories which you possess in the East, where you and a trading company rule together over not less than 70,000,000 of subjects—or established among those rich and

* Lord Brougham's Speeches, Vol. II, p. 356.

populous islands which stud the Indian Ocean and form the Great Eastern Archipelago—or have their stations in those lands, part lying within the tropics, part stretching towards the pole, peopled by various castes, differing widely in habits, still more widely in privileges, great in numbers, abounding in wealth, extremely unsettled in their notions of right, and excessively litigious, as all the children of the new world are supposed to be, both from their physical and political constitution. All this immense jurisdiction over the rights of property and person, over rights political and legal, and over all the questions growing out of so vast and varied a province, is exercised by the Privy Council unaided and alone. It is obvious that, from the mere distance of those colonies and the immense variety of matters arising in them, foreign to our habits and beyond the scope of our knowledge, any judicial tribunal in this country must of necessity be an extremely inadequate Court of Review. But what adds incredibly to the difficulty is that hardly any two of the colonies can be named which have the same law; and, in the greater number, the law is wholly unlike our own. In some settlements it is the Dutch law, in others the Spanish, in others the French, in others the Danish. In our Eastern possessions these variations are, if possible, greater;—while one territory is swayed by the Mahomedan law, another is ruled by the Hindu law; and this, again, in some of our possessions is qualified or superseded by the law of Buddha; the English jurisprudence being confined to the handful of British settlers and the inhabitants of the three Presidencies". **1200—1936.**

Appeals from India.

The first occasion upon which a right of appeal was granted by Royal Charter to the Privy Council from the judgments of the Courts in India was in 1726.

CHAPTER X.

The Charter granted by George I in that year established the Mayor's Courts in the three Presidencies and gave a right of appeal from those Courts, first to the Governors in Council and thence to the Privy Council, where the amount in dispute exceeded the sum of 1,000 pagodas, i.e., 4,000 rupees. Both the Act of Parliament and the Charter to which the Supreme Court of Bengal owed its existence reserved a similar right of appeal to the Sovereign in Council. The same right was also reserved in reference to the Recorder's Courts and the Supreme Courts at Madras and Bombay. Any person aggrieved by a decision of any of those Courts in a suit the value of which was over 1,000 pagodas (except in the case of the Supreme Court of Bombay, where the value of the suit must have been above 3,000 Bombay rupees) could petition the Sovereign in Council, and the Council was empowered to refuse or to admit the appeal and to reform, correct, or vary such decision, according to the Royal pleasure.

From the Supreme Court.

Such were the regulations with regard to Courts established by Royal Charter. In 1781, on the establishment of the Sudder Court of Bengal, an appeal was given from its decisions in civil suits the value of which should be of £5,000 and upwards. No rules are prescribed by Parliament respecting the appeals so authorized. Rules and orders were framed by the Supreme Court and approved by His Majesty in Council according to the provisions of the Charter which established that Court. No such power was given by Act of Parliament to the Sudder Court, and consequently Regulation XVI of 1797 was passed in order to provide rules relative to appeals to the Privy Council against decisions of that Court until the King's pleasure should be known thereupon. That Regulation limited the right of appeal in point of time to a period of six

From Bengal Sudder Court.

months from the date of the judgment, and in point of value to cases where the judgment exclusive of costs of suit was of the value of Rs. 50,000.

From Madras and Bombay Sudder Courts.

In 1818, the right of appeal from the Sudder Courts of Madras and Bombay to the Privy Council was established and in all the Presidencies reservation was made of the Sovereign's right to reject or receive appeals notwithstanding any provisions in the regulations for the purpose of limiting or controlling the exercise of the right of appeal.

Fate of early appeals.

It appears that in the sixty years which elapsed from the establishment of the Supreme Court of Calcutta to the Statute of William IV which constituted the Judicial Committee of the Privy Council, only fifty appeals were instituted. The majority of those appear to have been from the Supreme Courts, which from the first were looked upon as offshoots from the Courts of Westminster Hall, the suits in them being carried on by English counsel and attorneys and the suitors in them being either Europeans or Natives in the habit of close intercourse with Europeans. Both the suitors and practitioners in the provincial Courts were very little acquainted with the mode of procedure in appeals to England, and either shrank from the attempt to prosecute such appeals, or from total ignorance as to the necessary proceedings failed either to follow up or to withdraw any appeal which had been commenced.*

When appeals lay to the Governor-General from the different Sudder Courts, decisions had been returned without anything being required to be done by the parties; consequently when appeal cases were transmitted to England, the parties patiently waited for

* Morley's Administration of Justice in India, pp. 145-8.

CHAPTER X.

a decision, but in vain, and in many cases the property in dispute was eaten up by private and public debt, and the litigants were either ruined or greatly impoverished.

Power of the Council to entertain appeals.

With regard to the power of the Council to entertain appeals and the right of the suitor to prefer them, the general principle is that* the Crown has an inherent general right controlled by Acts of Parliament to admit appeals from its subjects beyond the seas; but that Orders in Council and local rules are intended to regulate the manner in which that right shall be exercised.

In some cases it has been considered not only that local rules or general principles do not authorize an appeal (either because the order is not properly appealable, or because the due course has not been followed by the parties), but that they prevent the Privy Council from exercising any discretion in advising the Crown as to admitting one. In other cases, that although an appeal cannot be brought as of right, yet the Privy Council are not precluded from the exercise of their discretion upon the subject.†

Limited by legislation.

A petition for leave to appeal,‡ where the sum in dispute was of less amount than £500 sterling, was disallowed by the Privy Council, because the Colonial Legislature, in pursuance of powers conferred by the Imperial Parliament, had by its provisions on the subject of appeals deprived the subject of his right to appeal.

And by Charters.

Again, appeals might have been brought with the leave of the Supreme Courts in India from their decisions in criminal cases; but upon the principle of the case

* Macpherson's Judicial Committee Practice, p. 1.

† *Ibid.*, p. 4.

‡ *Cuvillier* v. *Aylwin*, 2 Knapp, p. 72, decided in 1832.

just stated, it was held that, as the Charter of the Supreme Court of Bombay was granted by the Crown in pursuance of an Act of Parliament, the Crown, authorized by statute, had thereby abandoned its prerogative to receive appeals in cases of felony, except upon leave obtained from the Court below.*

In another† case, Lord Brougham observed, in delivering the judgment of the Privy Council, that even independently of the statute "it might be reasonably contended that the Crown may point out the manner in which the general common law right of appeal to it from colonial sentences shall be exercised by a particular mode of enactment in the Charter. It may say there is a right to appeal to the Crown generally; that appeal shall be in civil cases at all times, but shall be in criminal cases only in a certain manner and form, and I shall delegate to my Judges below the right to refuse or to grant it, as they see fit".

No appeal in cases of felony.

And in the former* case cited, Dr. Lushington remarked, "not only in England, but throughout the dominions of the Crown of Great Britain, governed by the law of England, no right of appeal in felonies has ever existed. Nor are we aware that in any one single instance the Crown has ever, by the exercise of its prerogative, granted leave to appeal in any such case".

It was therefore fully settled that in cases of felony, when the Supreme Court of Bombay or any of the Supreme Courts of India had not granted leave to appeal, the Privy Council could not grant or advise the Crown to grant such leave, whether the appeal were from the verdict and judgment, or were confined

* *Queen* v. *Edaljee Byramjee*, 5 Moore P. C. 272.

† *Queen* v. *Alloo Paroo*, 5 Moore P. C. 296.

CHAPTER X.

to matter of error appearing upon the record. The Court below alone had the power of granting or refusing any appeal in such cases.

Act of William the Fourth and subsequent amendments.

In 1833, the Act 3 & 4 William IV, c. 41, was passed, and under it a permanent Judicial Committee was appointed for the disposal of appeals and other matters referred to them by His Majesty in Council in pursuance of the Act. The Committee was composed of the President of the Council and the Lord Chancellor, and several of the Judges of highest rank in the kingdom, with power to the Sovereign to add any two Privy Councillors as members of the Committee. Exclusive power was given to it to review all sentences of Courts abroad which were formerly appealable to the High Court of Admiralty or to the Commissioners in prize cases in England. In addition to that the entire appellate jurisdiction of the Sovereign in Council was directed to be exercised solely by the Judicial Committee; and power was given to the Crown to refer to the Committee for hearing or consideration "any such other matters whatsoever as His Majesty should think fit", in order that they should advise the Crown thereon. Four members, and, since 1843, three members* of the Committee form a quorum, a majority of whom must concur in their report or recommendation. The Crown was empowered to require the attendance at the Committee for the purposes of the Act of any Privy Councillor who should be a Judge of one of the three superior Courts of Common Law. By successive Statutes of Parliament, persons holding or who have held high judicial offices in Great Britain and Ireland, if a member of His Majesty's Privy Council, were made members of the Committee.

* See 6 & 7 Vict., c. 38, s. 1.

By later Statutes membership of the Committee was extended to Privy Councillors who hold or have held similar appointments in the Dominions. A further extension of membership was made by the Appellate Jurisdiction Act of 1908 in favour of persons, not exceeding two in number at a time, whom His Majesty may appoint in this behalf, who being a Privy Councillor is or has been a Chief Justice or Judge of any High Court in British India. Recently the Appellate Jurisdiction Act of 1929 has authorised the appointment by Letters Patent of two additional salaried members of the Committee from amongst specially qualified persons who being a Privy Councillor is or has been a Judge of the High Court as defined in the Indian General Clauses Act or is a Barrister, Advocate or Vakil of not less than 14 years' standing who practises or has practised in British India. Under 5 and 6 Geo. V, c. 92, the Judicial Committee may now sit in more than one division at the same time. 1200—1936.

The Judicial Committee have power to examine or direct the examination of witnesses at discretion; to remit the cause to the Court below for rehearing, either generally or with respect to certain points; and upon such rehearing to take further evidence, to admit evidence before rejected or reject evidence before admitted, and to direct issues to be tried in any Court in Her Majesty's dominions abroad.

All appeals were directed to be made within the time fixed by any existing law or usage, or within such time as should be ordered by the Council. Then with regard to the pending appeals (where there had been a delay of two years from the date of their admission) from the Sudder Dewanny Adawlut in the East Indies, the Act recited that transcripts of the proceedings had been received, but that the suitors

CHAPTER X.

had not duly prosecuted the same to a hearing, and thereupon it empowered the Sovereign in Council to give such directions to the East India Company and other persons as should be thought necessary for the purpose of bringing those appeals to a hearing.

In 1838 an Order in Council was issued which limited appeals from the Supreme Courts in India in point of time to six months from the date of the judgment and in point of value to Rs. 10,000 instead of Rs. 50,000.

As soon as the old appeals from the Sudder Courts in India had been determined, an Act was passed* which provided that from the commencement of the year 1846, all appeals admitted by the Sudder Court should be taken to be abandoned and withdrawn by consent of the parties thereto unless some proceedings therein should be taken in England within two years after the arrival of the transcript.

After the amalgamation of the Supreme and Sudder Courts by the High Courts Act of 1861, fresh Orders in Council were issued, those now in force being Orders in Council, dated the 9th of February, 1920, amended by Orders in Council of 1927 and 1928.

Acts of the Governor-General in Council.

In 1863† an Act was passed to regulate the admission of appeals to the Sovereign in Council from certain judgments and orders not subject to the general regulations; but this was repealed by Act VI of 1874 which consolidated and amended the law upon the subject. This Act was itself repealed and then re-enacted word for word by Act X of 1877, and then by Act XIV of 1882 (the Code of Civil Procedure), secs. 594

---

* 8 & 9 Vict., c. 30.
† Act II of 1863.

to 616, re-enacted again in secs. 109 to 112 and Or 45 of the Civil Procedure Code of 1908. Appeals are directed to lie to the Sovereign in Council from any final decree passed by the High Court or any other Court of final appellate jurisdiction in all cases where the amount or value of the matter directly or indirectly in dispute is 10,000 rupees or upwards; but where the decree appealed from affirms the decision of the Court immediately below it, the appeal must involve some substantial question of law. In other cases, an appeal only lies when it is certified to be a case fit for appeal. Nothing, however, in the Act is to bar the unqualified exercise of the Sovereign's pleasure, or to interfere with the rules made by the Judicial Committee. **1200—1936.**

Charters of the High Courts.

The Charters of the High Courts give a right of appeal to suitors in any matter not being of criminal jurisdiction from any final judgment, decree or order of those Courts made on appeal, or in the exercise of original jurisdiction by a majority of the full number of Judges, or of any Division Court from which an appeal does not lie to the High Court itself. The right so conferred is subject to the proviso that the matter in dispute is of the value of not less than Rs. 10,000, or that such judgment, decree or order involves directly or indirectly some claim to property of that value. An appeal also lies from any other final judgment, decree or order when the High Court shall declare that the case is a fit one for appeal.

The High Courts may, under the Charter, grant leave to appeal to the Privy Council from any preliminary or inter-locutory judgment, decree or order, or sentence in any matter not being of criminal jurisdiction.

CHAPTER X.

Further, a power of appeal is given (provided the High Court declares the case is a fit one for such appeal and under such conditions as it may require) from any judgment, order or sentence of a High Court made in the exercise of original criminal jurisdiction or in any criminal case where any point or points of law have been reserved for the opinion of the High Court.

The High Courts are directed by their Charters in all cases of appeal to certify and transmit to the Privy Council a copy of the proceedings so far as they relate to any appeal, and of the reasons given by the Judges for or against the judgment appealed against. The High Courts are also bound to execute the judgments and orders of the Privy Council.

Effect of the Reform Acts of 1935.

In what manner the establishment of a Federal Court for India, under the provisions of the Government of India Act, 1935*, may affect the jurisdiction in appeal of the Privy Council as outlined above has been indicated in Chapter VI (pp. 137-138, *ante*). The new Government of Burma Act † has given a right of appeal from every decision of the Burma High Court in which a question may arise as to the correct interpretation of the Act or any Order in Council made thereunder.

* 26 Geo. V., c. 2.
† 26 Geo. V., c. 3.

CHAPTER XI.

THE SUPERIOR COURTS.

Separation between Courts of Presidency Town and Mofussil—In laws and procedure—First attempts to amalgamate them—Abolition of Supreme Courts—Bill introduced to establish High Courts—Indian High Courts Act—Charters of High Courts—Civil jurisdiction of Bengal High Court—Original—Extraordinary original—Appellate—Criminal—Testamentary and intestate—Matrimonial—Madras and Bombay High Courts—Allahabad, Patna, Lahore, Rangoon and Nagpur High Courts—Result of the establishment of High Courts—Punjab Chief Court—Punjab High Court—Other High Courts—High Courts' powers under the Act of 1935—Retention of the old Presidency Town system—Insolvency Courts in the Presidency Towns—Insolvency jurisdiction in the Mofussil—Vice-Admiralty Courts—Divorce Courts.

Separation between Courts of Presidency Town and Mofussil.

THE previous chapter was confined to tracing the history of the judicial institutions which were established in the Presidency Towns and Mofussil, to account for their wide separation, their dissimilar origin, their long retention, and the very slight tendency towards amalgamation which they had exhibited. The inconveniences of such double system were numerous, but the differences in the procedure observed, and in the laws administered by these rival institutions, as well as the existence of a strong party feeling in favour of maintaining tribunals which should exercise exclusive jurisdiction over Europeans, rendered such system extremely difficult to abolish.

In laws and procedure.

With regard to the laws administered, the Courts established by the Crown and Parliament for the most part applied English law, both civil and criminal; exceptions being made, in favour of Hindus and Mahomedans, that in suits against parties of either

CHAPTER XI.

of those religions, by whomsoever they might be brought whether by Europeans or Natives, the law of the defendant should prevail. Their proceedings also were governed by the English law of procedure. Until 1834 they for the most part were amenable only to the legislative authority of Parliament, and to such regulations of Government as the Supreme Courts might choose to acknowledge and register.

The Mofussil Courts, on the other hand, had nothing to do with English law, but were amenable in all respects to the regulations of Government; and when Hindu or Mahomedan law did not apply, or when no regulations were applicable, were directed to proceed according to justice, equity, and good conscience. That is to say, in cases for which no law was provided, the Judges were authorized to use the best discretion they possessed. Originally the number of cases for which no specific law existed must have been considerable. For, setting aside Hindu and Mahomedan law, there was no law of contract, no law of succession, no territorial law, no law of evidence, no law of administration of deceaseds' estates. The wide field, from which all specific law was absent, was gradually reclaimed, as it were, and brought within the limits of civilization. But the process was very gradual and, until the establishment of the Indian Law Commission and the Imperial Legislature in 1834, could hardly be said even to have commenced. From that date, however, it proceeded very slowly, and it was only since 1858 that serious and effective progress has been made.

The procedure of those Courts was such as was from time to time prescribed by the regulations, which, by the constant process of repeal and amendment, at last gave a very uncertain and obscure expression to the rules which they provided.

Before the work of amalgamating these two rival sets of judicial institutions could possibly be proceeded with, it was absolutely necessary to make some attempts to bridge over the wide gulf which separated the laws which they respectively administered, and the procedure which they respectively observed. The abolition of the East India Company, the assumption of direct responsibility of government by the English Crown, and the consolidation of the Indian Empire under the Queen, which occurred in 1858, favoured the work of amalgamation which the influences of a century had impeded and prevented. Policy suggested that in re-establishing and consolidating the new empire, something more was required than an imperial army, government, and legislature. A uniform criminal law, a uniform system of Courts of civil and criminal procedure, and in the end a uniform civil law, so far as exclusive rights to personal laws, based upon religion, would permit, and as far as practicable, equal liability to the jurisdiction, were required as a basis upon which to found a just as well as an imperial administration.

1772—1936.

First attempts to amalgamate them.

In the next three years after the proclamation of the Queen, first the Civil Procedure Code, and then the Penal Code, and almost immediately afterwards the Criminal Procedure Code, all of which had been long in preparation, were enacted. They applied to the whole empire, and all Courts were governed by the procedures therein laid down, except the Supreme Courts and those established by Royal Charter.

Abolition of Supreme Courts.

When these Codes had been passed, a very long stride had been made in the direction of one uniform system for the administration of justice in India. The next step was to abolish the Supreme Courts in the three Presidencies and the anomalous procedure observed in them, and constitute in each Presidency town a High

CHAPTER XI.

Court of Judicature, which should be supreme over all the Courts both in the Presidency Towns and also in the Mofussil. The plan had long been in contemplation; in fact the continued existence of the Supreme Courts, alien as they were from the rest of the judicial system, was due to the high character they had maintained, and the confidence which was reposed in them by the public, and to the divergence in law and procedure to which I have referred and to the long delays in maturing and passing the three Codes mentioned above.

Bill introduced to establish High Courts.

Those three Codes were passed respectively in the years 1859, 1860, and 1861, and in the last of those three years a Bill was introduced into Parliament for the establishment of the High Courts. As far back as 1852--1853, in the evidence which was given before the Committee which sat on East Indian affairs, a strong opinion was expressed by those most competent to give it, that it was desirable with a view to the better administration of justice in India that the Supreme and Sudder Courts should, in each Presidency, be consolidated into one, so as (in the stereotyped phraseology) to unite the legal training of the English lawyers with the intimate knowledge of the customs, habits, and laws of the Natives possessed by the Judges in the country.

When Sir Charles Wood introduced the Bill in 1853, he was anxious to include a provision for effecting that object, and to empower Her Majesty to issue her Charter for the establishment of a united Court. But the members of the Indian Law Commission, though they approved of the proposed change, thought that it would be useless to attempt to unite the Courts till the Codes of Procedure were established. A Royal Commission, however, was issued to obtain the basis on which the forms of procedure could be framed.

It is worth while to observe that Sir Charles Wood, in introducing the Bill of 1861 into the House of Commons, laid special stress on the advantage of the Judges of the new* Courts going on circuit to try criminal cases. He said, "We shall have one Supreme Court, one sole Court of Appeal instead of two; and, inasmuch as the administration of justice in the minor Courts depends on the mode in which the appeals sent up from them are treated, the superior Court, thus constituted, will, I hope, improve the administration of justice generally throughout India. It is notorious that the greatest confidence is felt by the Natives in the administration of justice by the Supreme Court even at present. Now, according to the provisions of this Bill, the Judges of the Supreme Court may be sent on circuit throughout the country. The effect of this will be that in important cases occurring in the various districts, justice, as in this country, will be administered on the spot by a trained Judge. At present, if an Englishman commits a crime which may subject him to serious punishment, he and all the witnesses must be brought to Calcutta, and the case must be tried there. In future an English Judge going into the country will be able to try these cases. At present, when a crime is committed up-country by a European, the necessity of bringing him to Calcutta amounts in many cases to an absolute denial of justice. It may be impossible in a country like India to bring justice to every man's door, but at all events the system now proposed will bring it far nearer than at present; and when criminal offences are committed by a European—happily such instances are rare—the impartial administration of justice on the spot will produce a most desirable influence on the minds of the Natives.

1772—1936.

* Hansard, 1861, p. 647.

CHAPTER XI.

Indian High Courts Act.

The Act was speedily passed, and by it the Crown* was empowered to establish, by Letters Patent, a High Court for the Bengal division of the Presidency of Fort William and also at Madras and Bombay ; and it was enacted that thereupon the Supreme Courts and the Courts of Sudder Dewanny Adawlut and Sudder Nizamut or Foujdary Adawlut should be abolished. The jurisdiction and powers of the High Courts were to be fixed by the Letters Patent. The Crown was also empowered to establish a High Court in the North-Western Provinces.

Charters of High Courts.

Thereupon Charters were issued in 1862, and afterwards new Charters in 1865, constituting the High Courts in Bengal, Madras, and Bombay.

Civil jurisdiction of Bengal High Court.

Original.

That in Bengal was vested with ordinary original civil jurisdiction within the local limits of Calcutta, or within such local limits as might from time to time be prescribed by competent legislative authority for India.† Suits of every description were brought within their cognizance, except cases in which the Small Cause Court would have jurisdiction and in which the debt or damage or value of the property sued for did not exceed Rs. 100. The circumstance necessary to give jurisdiction is that the land must be situated, or the cause of action must have arisen, or the defendant must, at the time of the commencement of the suit, dwell or carry on business, or personally work for gain within the local limits of Calcutta. If only part of the cause of action were within those limits, then the leave of the Court must be obtained before the institution of

---

* 24 & 25 Vict., c. 104.

† 28 & 29 Vict., c. 15, ss. 3—6, gave the Governor-General in Council power to alter the local limits.

the suit. It has been held* that, if part of the land was situated within, and part without, the local limits, the High Court would nevertheless have jurisdiction. 1772—1936.

Extra-ordinary original. Its extraordinary original jurisdiction enables the Court to remove and to try and determine any suit falling within the jurisdiction of any Court, subject to its superintendence, whether within or without the Bengal division of the Presidency, either on the agreement of the parties to that effect or for purposes of justice, the reasons for so doing being recorded on its proceedings. Several causes of action between the same parties not being for land or other immovable property may be joined together in one suit and tried by the High Court if any one of those causes of action is within the High Court's jurisdiction.

Appellate. The High Court of Bengal was also constituted a Court of Appeal from the Civil Courts of the Bengal division of the Presidency and from all other Courts subject to its superintendence. It also has the like power and authority with respect to the persons and estates of infants, idiots, and lunatics, whether within or without the Bengal division of the Presidency, as was formerly vested in the Supreme Court.

Criminal. Its criminal jurisdiction is in respect of all persons within and without the limits of the Bengal division, and not within the limits of the criminal jurisdiction of any other Court and over whom the Supreme Court formerly had jurisdiction. It also has extraordinary original criminal jurisdiction over all persons who reside in places within the jurisdiction of any Court formerly subject to the superintendence of the Sudder

---

* *Prasannamayi Dasi* v. *Kadambini Dasi*, 3 B. L. R. (O. J.), 85, Norman, J. On appeal before Peacock, C. J., and Markby, J., the question of jurisdiction was not disputed.

CHAPTER XI.

Nizamut Adawlut in Calcutta upon any charge preferred by the Advocate-General or by any Magistrate or other officer specially empowered by the Government on their behalf. It was also constituted a Court of Appeal from the Criminal Courts of the Bengal division of the Presidency and from all other Courts subject to its superintendence. It is also a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction.

Testamentary and intestate.

It also succeeded to the powers of the late Supreme Court in relation to the granting of probates of last wills and testaments and letters of administration of the goods and all other effects whatsoever of deceased persons, whether within or without the Bengal division of the Presidency, except such as were within the limits of the jurisdiction for that purpose of any other High Court. It had jurisdiction of like character, also under the Indian Succession Act (X of 1865) and Act V of 1881, independently of the Charter. Under Act XIII of 1875, probate or letters granted by a High Court had effect throughout the whole of British India. Under Act VI of 1881 the High Court might appoint District Delegates to grant probate and letters in non-contentious cases. These and several other like enactments have now been consolidated into one Act, the Succession Act, XXXIX, of 1925.

Matrimonial.

It was vested with jurisdiction in matters matrimonial between Her Majesty's subjects professing the Christian religion.*

Its insolvency, maritime, and divorce jurisdiction will be described at the end of this chapter.

* The date of the first Charter of the Bengal High Court is 14th May, 1862; and of the second, 28th December, 1865.

Madras and Bombay High Courts.

The first Charters of the Madras and Bombay High Courts bear date the 26th of June, 1862. They were subsequently superseded by a further Charter of the same date as that which applied to Calcutta. They were similar in all respects to the Calcutta Charter, *mutatis mutandis*. The local limits of the ordinary civil original jurisdiction of either Court are such as may be fixed by a law of the Governor in Council, and until so fixed were the limits of the jurisdiction of the Supreme Court at the date of its abolition. The criminal jurisdiction extends over the limits just described and also over all persons beyond those limits who were subject to the criminal jurisdiction of the Supreme Court.

Allahabad, Patna, Lahore, Rangoon and Nagpur High Courts.

In March 1866, Letters Patent were issued establishing a High Court in the North-Western Provinces of the Bengal Presidency. Quite recently, in 1916, a High Court has been established by Letters Patent at Patna for the new Province of Bihar and Orissa which was carved out of the Bengal Presidency; the Chief Court of the Punjab has been replaced by a High Court at Lahore by Letters Patent of 1919; a High Court for Burma was established at Rangoon by Letters Patent of 1922, and another for the Central Provinces by Letters Patent of 1936.

Result of the establishment of High Courts.

The result of the establishment of the High Courts in the three Presidency cities was to combine the Judges of the Supreme and Sudder Courts, and thereby to constitute a single tribunal. But as far as the policy of fusing two rival systems of judicial administration was concerned, no great advance was thereby made. The Supreme Court in reality survived as a distinct branch of the High Court, viz., in its original side. The local extent of its jurisdiction, however, was confined within the limits of those cities,

CHAPTER XI.

neither the agreement of parties nor the national character of individuals being any longer sufficient to give the Court a power of adjudication. The law or equity which it enforced on its original side was the same as would have been applied by the old Supreme Court, and was distinct from the rules of law, equity, and good conscience applied by the appellate side which succeeded to the old Sudder Court. The criminal and admiralty, testamentary, and matrimonial jurisdictions of the High Court in its original side were precisely the same as those exercised by the tribunal to which it succeeded. Its criminal procedure, too, remained distinct from that of the appellate side. The real innovation was that the civil procedure of the old Supreme Court was swept away, and Act VIII of 1859 was substituted as the Code uniformly and universally applicable throughout India. Progressive legislation, establishing as time went on a body of Anglo-Indian law applicable in both Courts, has eventually completed, or nearly so, the fusion which was originally contemplated.

Uniformity, however, in the criminal law (the Penal Code having come into force on 1st January, 1862) and in the civil procedure of all Courts, and in civil and criminal appellate authority, dates from 1862.

The establishment of these High Courts and the passing of the Indian Councils' Act, 1861, seem to have led to a general reconstitution of Courts of Judicature throughout the country both in the regulation and in the non-regulation Provinces. In the Punjab, prior to the establishment of a High Court by Letters Patent at Lahore in 1919, a Chief Court had been established, constituted very much upon the model of the High Courts. It derived its existence from an Act of the Imperial Legislative Council, instead of a

Royal Charter, and the Judges who composed it were appointed by the Governor-General in Council and not by Her Majesty. It was established by Act IV of 1866, passed with the previous sanction of the Secretary of State for India in Council, to amend the constitution of the previously existing Judicial Commissioner's Court. Act XVII of 1877, and later on, Act XVIII of 1884, c. 2, reconstituted it. This Act was amended by Act XIX of 1895, and Act XXV of 1899. The new tribunal was invested with an original jurisdiction for the trial of certain civil and criminal cases. It consisted of three or more Judges. They held their offices at the pleasure of the Governor-General. The Chief Court was the highest Court of Appeal from the Civil and Criminal Courts in the Punjab, over which it had a general supervision and control. Its proceedings were regulated by the civil procedure for the time being in force in the Punjab; and in exercising its jurisdiction it was bound to apply the rules of law or equity and good conscience which the local Court would have applied. It had complete jurisdiction over European British subjects, and it had superintendence over all Courts subject to its appellate jurisdiction.

1772–1936.

Punjab Chief Court.

The Letters Patent of 1919 raised the Chief Court to the Status of a Chartered High Court.

Punjab High Court.

In the following chapter will be found other instances of Courts originally established by Indian Legislation being in course of time raised to the rank of Chartered High Courts.

Other High Courts.

It has been observed, in Chapter VI (p. 139 *ante*) that the Government of India Act of 1935* has not

* 26 Geo. V, c. 2.

CHAPTER XI.

limited itself to defining the powers and jurisdiction of the Chartered High Courts, but has made general provisions for both Chartered and non-Chartered High Courts. These define the jurisdiction and powers of the High Courts and the manner of their exercise to be what they were before the Act, but subject to the Act, to Orders in Council, and to any Act or Acts of the appropriate Indian legislature passed in virtue of powers conferred on it by the Act. No High Court has original jurisdiction in matters concerning revenue or the collection thereof, but such authority may be given to a High Court by the appropriate Indian legislature, provided the Bill or amendment in that behalf is previously approved by the Governor-General or Governor. Section 224 expressly takes away from the Chartered High Courts the power hitherto exercised by them of interfering with the judgments of inferior Courts otherwise than by way of appeal or revision. Section 226 is specially noteworthy, as it imposes upon each High Court obligatory power, upon motion by the Advocate-General for the Federation or the Advocate-General for the Province, as the case may be, to transfer for trial by itself from any Court subordinate to it any case which involves or is likely to involve a question as to the validity of a Federal or Provincial Act. All proceedings in every High Court in India are required to be in the English language (Secs. 223—227).

High Courts' Powers under the Act of 1935.

Retention of the old Presidency Town system.

Very little progress in reality was effected by the High Courts Act itself towards amalgamating the Presidency Town and Mofussil systems of judicial organization. But subsequent legislation in this country reconstituted almost all the Civil and Criminal Courts of the country. These will be considered hereafter. Here it is proposed to describe in detail the

institutions which chiefly belong to the Presidency Town system. 1772—1936.

Insolvency Courts in the Presidency towns.

With regard to the establishment of Courts for the relief of insolvent debtors in British India, they were first established by Act of Parliament in 1829.* They were directed to be holden from the 1st of March, 1829, once a month at least throughout the year, and oftener, if need be, in Calcutta, and as often as found necessary within the towns of Madras and Bombay, by any one Judge of the Supreme Court of the Presidency. Though presided over by a Judge of the Supreme Court, the Insolvency Court had a distinct and separate existence. An appeal lay from it under the statute to the Supreme Court, which had power to make rules to facilitate the relief of insolvent debtors in cases for which sufficient provision had not been made in the Act. Four years was the period assigned as the duration of the Act, which was afterwards extended by subsequent enactments to the year 1848 when the Act was repealed, the Insolvent Courts, however, being at the same time re-established.

Previous to the establishment of those Courts by the Act of 1829, an Act of Parliament† passed in the year 1800 was the basis of jurisdiction to grant relief to insolvent debtors in India. It empowered the Supreme Courts at Fort William and Madras and the Recorder's Court at Bombay to make rules and orders, extending to insolvent debtors in India the relief intended by an Act of Parliament called the Lords' Act, passed in 1759. It ratified all rules and orders previously made by the Supreme Courts for granting such relief, and confirmed the acts done under such rules and orders.

* 9 Geo. IV, c. 73.
† 39 & 40 Geo. III, c. 79.

CHAPTER XI.

In 1848,* an Act of Parliament was passed to consolidate and amend the law relating to insolvent debtors in India. It provided that the Courts of 1829 should be continued. Their† jurisdictions severally extended to the disposal of all petitions by persons imprisoned within the limits of the Presidency Towns upon any process whatever, or who resided within the jurisdiction of any of the Supreme Courts and were in insolvent circumstances. Act III of 1909 of the Indian Legislature replaced the utterly antiquated Statute of 1848 and brought the law on lines with the English Bankruptcy Statutes of 1883 and 1890. Jurisdiction in insolvency has been conferred by this Act on the High Courts at Calcutta, Madras, Bombay, Rangoon and on the Court of the Judicial Commissioner at Karachi, and is exercisable by one of the Judges of these Courts.

Insolvency jurisdiction in the Mofussil.

As regards the Mofussil in general there was until 1907 no law of insolvency and no Courts for the relief of insolvent debtors. The Civil Courts could, however, under the operation of sec. 271‡ of Act VIII of 1859, effect some of the purposes of insolvency law, subject however to this, that the creditor who first attached the property of the debtor was entitled to be paid in full while the rest of the creditors were paid

---

* 11 & 12 Vict., c. 21.

† *Ibid.*, sec. 5.

‡ The Section was as follows :—

"If, after the claim of the person on whose application the property was attached has been satisfied in full from the proceeds of the sale, any surplus remain, such surplus shall be distributed rateably amongst any other persons who, prior to the order for such distribution, may have taken out execution of decrees against the same defendant, and not obtained satisfaction thereof. Provided that when any property is sold subject to a mortgage, the mortgagee shall not be entitled to share in any surplus arising from such sale."

rateably. Such a provision led to a scramble amongst creditors, in which an unfortunate debtor or his property stood little chance of quarter or of consideration, while the successful creditor himself could not justify his priority on any principle of equity or fairness. Some provisions with respect to insolvency were to be found in what was called the Civil Code of the Punjab, and also in Major Spark's Code, applicable to parts of British Burma. A cautious advance was made by a provision of the Civil Procedure Code of 1882, since embodied in sec. 73 of the Civil Procedure Code of 1908, permitting holders of decrees against the same judgment debtor to participate rateably in the assets realised in execution of one of them. But a general Insolvency Act of wide scope was passed in 1907, since replaced by Act V of 1920. The jurisdiction in insolvency is given to the District Courts, but the Local Government has power by notification to authorise any subordinate Court to exercise it in any class of cases. 1772—1936.

Vice-Admiralty Courts.

With regard to Vice-Admiralty Courts, the Crown was empowered in 1800* to issue a Commission from the High Court of Admiralty in England for the trial and adjudication of prize causes and all other maritime questions arising in India, and to nominate all or any of the Judges at the respective Presidency Towns, either alone or jointly with others, to be the Commissioners for carrying out the purposes of the Commission. In William the Fourth's reign, an Act† was passed which gave an appeal to the High Court of Admiralty in certain cases. It defined the jurisdiction of the Vice-Admiralty Court to extend to all cases where a

* 39 & 40 Geo. III, c. 79, s. 25.
† 2 Will. IV, c. 51.

CHAPTER XI.

ship or vessel or the master thereof should come within the local limits of any Vice-Admiralty Court, irrespective of the cause of action having arisen out of those limits.

A separate Vice-Admiralty Court appears to have been established in Calcutta in 1822. The Charters of the High Courts in 1862 and 1865 conferred the same civil and maritime jurisdiction on the Vice-Admiralty Court, and the same jurisdiction for the trial and adjudication of prize causes and other maritime questions arising in India, as was vested in Commissioners under the Act of George III.*

Under Act XVI of 1891 or by Letters Patents since issued, the High Courts of Bengal, Madras and Bombay, the High Courts at Patna and Rangoon, the District Court of Karachi and the Resident's Court at Aden have been constituted Colonial Courts of Admiralty within the meaning of the Colonial Courts of Admiralty Act, 1890 (53 and 54 Vict., c. 27). The High Court at Patna can exercise this jurisdiction in the coastal province of Orissa. The orders of these Courts are appealable finally to the Sovereign in Council under sec. 6 of the latter Act.

Divorce Courts.

In 1869 the High Courts were constituted by Act IV of 1869, passed by the Governor-General in Council, Courts of Divorce of persons professing the Christian religion. The Chief Court of the Punjab, first of like tribunals not established by Royal Charter, was vested with a similar jurisdiction, viz., the power of granting, upon grounds which would entitle to a divorce in England, a final decree for dissolution of marriage.

---

* 39 & 40 Geo. III, c. 79. See the Colonial Courts of Admiralty (India) Act XVI of 1891.

British Burma in that respect was placed within the jurisdiction of the High Court of Bengal; and all other non-regulation Provinces, and places in the dominions of allied Princes and States, were placed in respect of Christian subjects of Her Majesty residing therein under the jurisdiction of the particular High or Chief Court within whose original criminal jurisdiction the petitioner for divorce would have been subject, if a European British subject. The District Courts, both in regulation and non-regulation Provinces, have also a concurrent divorce jurisdiction with the High or Chief Courts to whose appellate jurisdiction they are subject, but it does not extend to the making a final decree for dissolution. Later Acts have extended divorce jurisdiction; see Act XXI of 1866 in regard to native converts to Christianity, Act XV of 1875 in regard to Parsis and Madras Act IV of 1896 in regard to certain Malabar Hindus. 1772—1936.

The validity of divorce granted by Indian Courts, when the parties though resident within their jurisdiction have domiciles outside India, having been questioned by Courts in England and India, the Indian and Colonial Divorce Jurisdiction Act of 1926 (16 and 17 Geo. V, c. 40) was passed to validate such orders when made as between persons domiciled in England and Scotland. Divorce orders passed by Indian Courts as between parties domiciled elsewhere will apparently have no binding effect outside India.

The above is a summary of Courts exercising general jurisdiction. Many of these Courts (including the High Courts) have from time to time been vested with special jurisdictions by Indian legislation, which has also, when found necessary, instituted special

CHAPTER XI.

Courts of limited jurisdictions. They do not come conveniently into the general picture.*

---

* See Trevelyan's Constitution and Jurisdiction of Courts of of Civil Justice in British India. Thacker, Spink and Co., Calcutta, 1923.

CHAPTER XII.

THE INFERIOR CIVIL COURTS.

Courts of British Burma—Recorders' Courts—Subsequent changes —Upper Burma—Lower Burma—Burma High Court—Non-Regulation Territories—Central Provinces—Punjab—Oudh —Sind, Aden and Coorg—Appellate Procedure in these Courts —Civil Courts in Bombay—Civil Courts in Bengal and N.W.P. and Assam—Powers of High Court over the Civil Courts—Of the District Judge—Madras—General observations—Presidency Small Cause Courts—Act IX of 1850—Act XXVI of 1864—Act XV of 1882—Mofussil Small Cause Courts.

As soon as the Legislature was reconstituted under the Indian Councils' Act, and was vested with a complete power of legislation over the non-regulation Provinces, it began to provide a system of Courts whose powers and jurisdiction should be based upon its own enactments.

Courts of British Burma.

The first country which attracted the attention of the Legislature was British Burma, and by Act I of 1863 six grades of Courts were established in addition to Recorders' and Small Cause Courts thereafter to be established, the Chief Commissioner's being the highest. The Act maintained all the existing classes of Courts in British Burma, defined the jurisdiction to be exercised by each grade of those Courts, and laid down rules for the admission of regular as well as special and second appeals. It extended to British Burma generally the Code of Civil Procedure which had already been in force under an order of the Supreme Government in the entire territory except the Province of Pegu. It also extended to Pegu the Limitation Act XIV of 1859.

CHAPTER XII.

Recorders' Courts.

Then came Act XXI of 1863, which was passed apparently with the object of reviving on new soil the old Recorders' Courts which had once flourished in Calcutta, Madras and Bombay. Under it there was established at Rangoon and Moulmein a Court presided over by a barrister or advocate of five years' standing appointed by the Governor-General in Council, with full powers of civil and criminal jurisdiction. An appeal lay to Her Majesty in Council from the Recorder in all cases of the value of Rs. 10,000 or upwards, and to the High Court of Bengal in all cases between the value of 3,000 and 10,000 rupees. The Recorder moreover was vested with all the powers of a Court of Session as defined in the Code of Criminal Procedure within certain territorial limits, except that he had no power to try, but only to commit to the Bengal High Court, any European British subject charged with an offence punishable with death.

Subsequent changes.

Act VII of 1872 repealed both these Acts and for three years regulated the Courts in British Burma. The Chief Commissioner had found that his executive duties prevented him from properly discharging the judicial business thrown upon him. The principal object of the new Act was to relieve him of that burden. A Judicial Commissioner was constituted thereby to the head of the Judicial system of the Province, and to have most of the powers of a High Court. The Recordership of Moulmein was discontinued.

Then came Act XVII of 1875, which repealed Act VII of 1872, and* till 1889 regulated the Courts of British Burma. Six grades of Civil Courts were established, the two lowest Courts being held by extra Assistant Commissioners. Above them in order were

* It was amended in 1884 and 1885.

the Court of the Deputy Commissioner, of the Judge of the town of Moulmein, of the Commissioner, and highest of all of the Judicial Commissioner. The Court of the Recorder was continued, with a jurisdiction similar to that conferred upon him originally by Act XXI of 1863. It included divorce, insolvency and admiralty jurisdiction. 1861—1936.

Upper Burma.

In 1886 the territories of King Thebaw became part of British India and known as Upper Burma, the former dominion of the Queen being entitled Lower Burma. By Regulations VII and VIII of 1886, passed under 33 Vict., c. 3,* and later on by Regulations I and VI of 1896, criminal and civil courts were established therein similar to those established in other parts of India (the Highest Court being the Court of the Judicial Commissioner of Upper Burma); the law in force being declared by Upper Burma Laws Act XX of 1886, and its amendments.

Lower Burma.

In Lower Burma, Act XI of 1889 repealed Act XVII of 1875 and until 1900 established the Courts of that country. The six grades of civil courts were retained under the superintendence of the Judicial Commissioner. So also the Court of the Recorder of Rangoon, with his former jurisdiction, who held his court ordinarily at Rangoon, but might be directed by the Local Government to hold it on any particular occasion anywhere in Lower Burma in a civil case, and anywhere in Lower or Upper Burma in a criminal case in which a European British subject was concerned. In such criminal cases the Recorder was made the High Court for the whole of Burma. A special Court was constituted by this Act composed ordinarily of the Judicial Commissioner and Recorder sitting together,

* See *ante*, p. 87.

CHAPTER XII.

though the Local Government might add thereto the judge of Moulmein, with a defined appellate jurisdiction, and with the powers of a High Court in certain criminal matters.

Then came Act VI of 1900, which for the first time established a Chief Court composed of a Chief Judge and three or more other judges, as the highest Civil and Criminal Court of Appeal for the whole of Lower Burma, and as the High Court for the whole of the territories administered by the Lieutenant-Governor of Lower Burma, including the Shan States in reference to proceedings against European British subjects. The Chief Court was also the principal Civil and Criminal Court of original jurisdiction for the Rangoon Town exerciseable by a single judge, with appeal to a bench thereof consisting of two other judges. It was vested with a general superintendence and control over all other Civil Courts in Lower Burma. Four grades of Civil Courts were established : (1) the Township Court ; (2) the Subdivisional Court ; (3) the District Court ; (4) the Divisional Court, with a power of appeal from a lower to a higher Court. The effect of this Act was that the appellate jurisdiction of the High Court of Bengal in cases between Rs. 3,000 and Rs. 10,000, which had lasted for 37 years, was abolished. The Court known as the Special Court, which had been continued by Act XI of 1889, composed of the Judicial Commissioner and Recorder of Rangoon, was also abolished.

Burma High Court.

Since 1923, Burma is under the judicial jurisdiction of a Chartered High Court, established by Letters Patent dated 11th November, 1922. The High Court exercises original Civil jurisdiction in the City, and Appellate jurisdiction over the whole Province.

The Government of Burma Act of 1935* defines the jurisdiction and powers of the Burma High Court in terms practically identical with those used in the Government of India Act of 1935† (see p. 234 *ante*) for defining the jurisdiction and powers of the High Courts in India. There is of course no Federal Court for Burma, the constitution of it being unitary; but special facility is provided for obtaining authoritative interpretations from the Privy Council of the provisions of the new Constitution by giving, in addition to all existing rights of appeal, a special right to appeal to the Privy Council from every decision of the High Court on the ground that a question of law with reference to the interpretation of the Act or any Order in Council thereon has been wrongly decided (secs. 84 to 88). **1861—1936.**

Non-regulation territories.

Then, with regard to the non-regulation Provinces of Oudh, the Central Provinces, the Punjab, and other territories, no attempt had originally been made to provide distinct and matured systems of judicial administration, such as had been conferred on the three Presidencies. The systems introduced had been hurriedly conceived and framed, as the territories to which they related were from time to time annexed. The legislation relating to these and other matters was to be found in numerous rules and orders which acquired the force of law under sec. 25 of the Indian Councils' Act. The Indian Legislature accordingly proceeded to establish Courts and define judicial authority in those Provinces by its own enactments.

Central Provinces.

In the Central Provinces there were eight grades of Courts established by Act XIV of 1865, in addition to

* 26 Geo. V, c. 3.
† 26 Geo. V, c. 2.

CHAPTER XII.

Courts of Small Causes and to any other Courts thereafter to be established. Act XVI of 1885 reconstituted them, being itself amended by Act IV of 1901. The highest Court was that of the Judicial Commissioner. It was declared by the Act to be the highest Civil Court of Appeal. The lowest Court was that of the tehsildar of the second class, with jurisdiction in suits of every description up to Rs. 100 in value; next to him the tehsildar of the first class, with jurisdiction up to Rs. 300; next to him the Assistant Commissioners of the third class, the second class and the first class, with jurisdiction up to Rs. 500, Rs. 1,000, and Rs. 5,000 respectively; sixthly, the Deputy Commissioner, whose original jurisdiction was not limited to any pecuniary amount, and who had power to hear appeals from decisions and orders of Courts subordinate to him; and seventhly, the Commissioner whose jurisdiction was without pecuniary limit and who exercised appellate jurisdiction over his assistants and deputies, being in turn subject to the appellate jurisdiction of the Judicial Commissioner. This somewhat primitive organisation of Courts and Jurisdictions was replaced by a system analogous to those of the other Provinces by the Central Provinces Courts Act, I of 1917. The Judicial Commissioner's Court has since been raised to the status of a Chartered High Court by Letters Patent issued in 1936.

Punjab.

By Act XIX of 1865 seven similar grades of Courts were established in the Punjab, viz., a Court of the tehsildar, of three Assistant Commissioners with ordinary special and full powers, a Deputy Commissioner, a Commissioner, and a Judicial Commissioner. And by Act IV of 1866, in lieu of the Court of the Judicial Commissioner, there was constituted the Chief Court of the Punjab (which was a High Court

within the meaning of the Civil Procedure Code), consisting of Judges appointed by the Governor-General in Council. Then Act XVII of 1877 was passed combining all the Courts under one Act. Up till 1919 they were regulated by Act XVIII of 1884, amended by Act XIII of 1888, and Act XXV of 1899, and consisted of a Chief Court and four subordinate Courts, viz., the Divisional, the District, the Court of the Subordinate Judge, and the Court of the Moonsiff. By Letters Patent issued in 1919, the Chief Court has been raised to the rank of a Chartered High Court. 1861—1936.

Oudh.

The Oudh grades of Courts, established by Act XIV of 1865, were similar to those provided for the Central Provinces. That Act, however, was framed chiefly with reference to the Central Provinces; it was found incomplete as regards Oudh, and inconvenient, having regard to some subsequent legislation in reference to that territory. Accordingly, in 1871, the Oudh Civil Courts' Act* was passed, which applied to all Civil Courts in Oudh. It constituted five grades of Courts, viz., those of (1) the Tehsildar; (2) the Assistant or Extra Assistant Commissioner; (3) the Deputy Commissioner or the Civil Judge of Lucknow; (4) the Commissioner; (5) the Judicial Commissioner. Later on, Act XIII of 1879 repealed this enactment, and provided that there should be four grades of Civil Courts in Oudh, viz.:—(1) the Moonsiff; (2) the Subordinate Judge; (3) the District Judge; (4) the Judicial Commissioner. They were all appointed, and the limits of their jurisdiction fixed, by the Local Government, the previous sanction of the Governor-General in Council being necessary in the case of the Judicial Commissioner. The general control over all

* Act XXXII of 1871.

CHAPTER XII.

the Courts in any district was vested in the District Judge, subject to the general control of the Judicial Commissioner. The Court of the District Judge was the principal Civil Court of original jurisdiction in his district. He entertained appeals from the Courts of the first two grades, and his own decisions might be appealed to the Judicial Commissioner. Act XIV of 1891 and Act XVI of 1897 provided for the appointment of additional Judicial Commissioners in some cases to exercise the jurisdiction of the Judicial Commissioner, in other cases to sit with him and form a Special Court. The Judicial Commissioner's Court was raised to the status of a Chief Court by U. P. Act IV of 1925.

Sind, Aden and Coorg.

Courts were also established in Sind by Act XII of 1866 (Bombay Code), amended by Bombay Acts I of 1906, I of 1910 and II of 1916, at Aden by Act II of 1864, and in Coorg by Regulation II of 1881, which was passed by the Governor-General in pursuance of the legislative power conferred on him by 33 Vict., c. 3.

Appellate procedure in these Courts.

The systems* thus established in the non-regulation Provinces differed chiefly with regard to the procedure adopted in the matter of appeal. In some cases a second appeal on the merits was given, which was in some Provinces final, in others liable to a further special appeal. In other cases no right of second appeal was given, but an extraordinary power of revision was vested in the Appellate Courts. The principle which eventually found most favour with the Legislature, to judge from the discussion upon the Oudh Bill, was to grant a second appeal on the merits when the Court of first appeal differed from the Court of first instance. In the case of Oudh the further provision was made

* Legislative Proceedings, India, Vol. X, 1871, p. 595.

in 1871 that such second appeal should in all cases lie to the highest Court of appeal in the Province. 1861—1936.

Civil Courts in Bombay.

Next with regard to Courts subordinate to those established by Royal Charters granted in pursuance of the Imperial Act of 1861, Act XIV of 1869 was passed in reference to the Presidency of Bombay. The law which regulated the constitution of the Civil Courts in that Presidency was considered to be in an unsatisfactory state. It was contained in unrepealed fragments of regulations passed in the years 1827, 1830, 1831, 1833, and 1834, which enacted such modifications of the original system as experience suggested; and thus,* although the law when ascertained was simple enough, it came to be stated in so complicated a way that there were few persons by whom it was thoroughly understood. The new Act (amended by Act IX of 1880 and Bombay Act I of 1900) reproduced the essential provisions of those Regulations, and effected several amendments and alterations.

It appears that the law† relating to Principal Sudder Ameens and Moonsiffs in Bengal had been previously consolidated. The object of the Bombay Act was to effect a similar work of consolidation. In lieu of three grades of Subordinate Civil Judges, viz., Principal Sudder Ameens, Sudder Ameens and Moonsiffs, two grades of Subordinate Judges were established, viz., of the first class with jurisdiction up to Rs. 10,000, and second class with jurisdiction up to Rs. 5,000. The District Judge was enabled to hold his Court at any town in his district. The Subordinate Judges were empowered to hold their

* Legislative Proceedings, India, Vol. VIII, p. 11.
† Act XVI of 1868.

CHAPTER XII.

Courts in more places than one within the local limits of their jurisdiction.

The Act extended to the territories under the Governor of Bombay in Council other than Sind in which the Code of Civil Procedure was on the day of the passing of the Act in force; and might be extended by the local Government, which was empowered to fix the limits of districts and to appoint District Judges. The local Government might also with the sanction of the Governor-General in Council appoint in any district a joint Judge with the powers of a District Judge and a jurisdiction concurrent with his; also Assistant Judges, to whom the District Judge might refer original suits up to Rs. 10,000 in amount, but not appeals; also the Subordinate Judges before mentioned of two classes.

Thus, as regards the Bombay Presidency, the Punjab, the Central Provinces, British Burma, and other non-regulation territories, the entire law by which the system of judicial administration was regulated is set forth in the several Courts Acts relating to those territories; but down to 1871, in order to ascertain in Bengal, and down to 1873, in order to ascertain in Madras, the exact constitution and jurisdiction of the Civil Courts, it was necessary to institute a laborious search through the regulations.

Civil Courts in Bengal, and N.W.P. and Assam.

In 1871 it was found expedient to consolidate and amend the law relating to the District and Subordinate Civil Courts in the Lower and North-Western Provinces of the Presidency of Bengal. Accordingly Act VI of that year* was passed by the Governor-General in Council, called the Bengal Civil Courts Act, 1871. Act XII of 1887 was subsequently passed, consolidating

* See *ante*, p. 123.

the law relating to those Courts and to the Courts of Assam. It is under this later Act* that the Judges of those Courts, of which there are four classes now, exercise their jurisdiction. It gives to the Government power to fix from time to time the number of District Judges and of the Subordinate Judges and Moonsiffs in each district; and, on the recommendation of the High Court, to appoint Additional Judges. 1861—1936.

It gives to the District Judge, subject to the superintendence of the High Court, the general control over all the Courts in his district. The Local Government is vested with power to fix and alter the local limits of the jurisdiction of any Civil Court under the Act. The Judge or Subordinate Judge has cognizance of all original suits subject to the provisions of the Civil Procedure Code: but the Moonsiff's jurisdiction is limited to suits not exceeding Rs. 1,000, though by notification the Local Government may extend it to Rs. 2,000. The District Judge has an appellate jurisdiction in reference to the decrees and orders of Subordinate Judges and Moonsiffs except where the amount or value of the subject-matter in dispute exceeds Rs 5,000, in which case the appeal lies to the High Court. The High Court also entertains appeals from decrees and orders of District and Additional Judges. The District Judge has power to refer to any Subordinate Judge under his control and subsequently to withdraw from him any appeals pending from the decisions of Moonsiffs.

The Local Government has power to suspend and remove for misconduct any District, Additional or Subordinate Judge or Moonsiff.

---

* See, however, Acts VII of 1889, VIII and XX of 1890.

CHAPTER XII.

Powers of High Court over the Civil Courts.

The powers of the High Court, in regard to these judicial officers, are (1) that in case of urgent necessity it may suspend a Subordinate Judge and forthwith report to the Local Government the circumstances of the suspension, the final order in the matter resting with the Local Government; (2) it may appoint a Commission for inquiring into the alleged misconduct of any Moonsiff, and according to the result of such inquiry, remove or suspend him; (3) it may suspend him pending the result of the inquiry, or it may proceed to punishment without appointing any Commission.

Of the District Judge.

A District Judge also may, in case of urgent necessity, suspend a Moonsiff and report the circumstance to the High Court, with whom the power of making a final order rests.

Madras.

In reference to Madras, Act III of 1873* contains provisions for the Courts of the districts of that Presidency similar to those which are contained in Act VI of 1871, except that the Moonsiff has jurisdiction up to Rs. 3,000. The Act extends to the whole Presidency exclusive of those tracts which are subject to the Agents for Ganjam and Vizagapatam. Act VII of 1892 established an additional Civil Court for the city.

General observations.

Such is a short sketch of the existing judicial institutions of India. They are nearly all of them of recent origin, dating their establishment from enactments and Charters which have all been passed since 1861. Acts of the Legislative Council, apart from the old regulations, have become the foundation of all the Courts in India, except those expressly constituted by Royal Charter. The whole of them might probably be consolidated in one Civil Courts Code, establishing

* Amended by Act XXI of 1885, and the Decentralisation Act of 1914.

throughout the country in every province a gradation of Courts similar in title and jurisdiction. The difficulty standing in the way of such consolidation arises from the fact that in several of the less advanced provinces, the civil judicial work is still performed by executive officers, whereas in the others civil judicial officers do exclusively civil judicial work, and a consolidating Civil Courts Code cannot as yet be conveniently framed which would be applicable to all the provinces equally. 1861—1936.

The mode in which the civil Courts are placed in regular degrees of subordination is exhibited by the general law of appeals, which so far as the chief appellate authority is concerned, now depend upon the High Courts' Charters and the Civil Procedure Code.

The actual course of appeal differs in the different provinces. There are in Bengal, Madras, and the North-Western Provinces four kinds of Judges—Moonsiffs, Subordinate Judges, District Judges, and High Court Judges; Sudder Ameens and Principal Sudder Ameens having been abolished. Moonsiffs may try cases up to Rs. 1,000 or Rs. 2,000 (in Madras up to Rs. 2,500), and an appeal lies from their decision to the District Judge.

From the decisions of Subordinate Judges the appeal lies to the District Judge if the value of the case does not exceed Rs. 5,000, and in all other cases direct to the High Court. The original jurisdiction, on the other hand, of the District Judges is unlimited in amount, including an important miscellaneous civil jurisdiction, as for instance, under the Succession Act, the Divorce Act, and the like. The appeal from their decisions lies to the High Court.

In Bombay, Moonsiffs, as well as Ameens, are abolished, and there are five kinds of Judges, viz.,

CHAPTER XII.

Subordinate Judges of two classes; (1) those who may try cases up to Rs. 5,000 ; (2) those who may try cases beyond that amount; above them District Judges, with their Assistant Judges under them, and their Joint Judges, with concurrent jurisdiction ; and finally High Court Judges. District Judges are the principal Courts of original civil jurisdiction in the district, and are also Courts of Appeal from all decrees and orders passed by subordinate Courts, except from decrees above Rs. 5,000, in which case the appeal lies to the High Court. There are also Joint Judges and Judges having concurrent jurisdiction with District Judges, but doing such civil business only as they receive from the District Judge or the High Courts. Assistant Judges are subordinate to the District Judges, and may try any cases referred to them by the District Judges not exceeding Rs. 10,000, and not being in the nature of appeals. An appeal lies from such Assistant, as from a Subordinate Judge of the first class, to the District Judge in cases under Rs. 5,000, and in cases exceeding that amount to the High Court.

Conditions in the other provinces have tended to approximate more and more to those prevailing in one or other of these four provinces.

Small Cause Courts.

Besides the judicial organisation just described, the Courts of the country include a variety of tribunals established for the purpose of adjudicating upon small causes in a less expensive and more expeditious manner than is possible in those which have been described in this and in the last chapter. A sketch of these will conclude the account of the existing Civil Courts of British India.

The Courts of Small Causes in the Presidency Towns, as they now exist, were originally established under

Act IX of 1850. They are the successors of the old Courts of Requests, which were established at Calcutta, Madras, and Bombay in 1753, by the Charter of George II; the limit of their jurisdiction being originally five pagodas, subsequently in 1797,* extended to Rs. 80. Two years later, an Act† of Parliament was passed to enable the Governors of Calcutta and Madras to extend the jurisdiction of those Courts to Rs. 400 sicca, to alter and reform the constitution and practice of the Courts, and to frame new rules and orders. By proclamation, in pursuance of this Act, Commissioners were appointed for the recovery of small debts in Bengal, and the jurisdiction of the Court was extended in 1819 to Rs. 400 sicca. The Courts of Requests at all the Presidencies were, by the Charter of Justice and by the proclamations, placed under the control of the Supreme Court, in the same manner that inferior Courts in England were placed under the control of the Court of Queen's Bench, and they continued to exist till 1850. 1861—1936.

In that year an Act was passed repealing the provisions of George II's Charter, and all Acts made concerning the constitution or practice of the Courts of Requests. Courts of Small Causes were established as Courts of Record, with jurisdiction conterminous with that of the abolished Courts; the judges were to be appointed by the Governor in Council, and to have cognizance over all suits when the debt or damage claimed or the value of the property in dispute was not more than Rs. 500, whether on balance of account or otherwise. It was provided that any Judge or Judges of the Supreme Court who should consent to aid in the execution of the Act, might exercise all the Act IX of 1850.

* 37 Geo. III, c. 142, s. 30.
† 39 & 40 Geo. III, c. 79, s. 17.

CHAPTER XII.

powers of a Judge appointed under it, and might try suits as if he were a Small Cause Court Judge. All suits brought in the Small Cause Court were directed to be heard and determined in a summary way, and every defence which would be deemed good in the Supreme Court, sitting as a Court of Equity, was declared to be a bar to any legal demand in the Court of Small Causes.

Act XXVI of 1864.

In 1864 an Act* was passed extending the jurisdiction of these Courts to the recovery of any debt, damage, or demand, exceeding the sum of Rs. 500, but not exceeding the sum of Rs. 1,000, provided that the cause of action should have arisen, or the defendant, at the time of bringing the action, should dwell or carry on business, or personally work for gain, within the local limits of the jurisdiction of the Court. Moreover, by consent of parties the Court had jurisdiction in cases exceeding in value the sum of Rs. 1,000. In cases exceeding Rs. 500 in value, the judges were directed to reserve doubtful questions of law or equity for the opinion of the High Court, and to give judgment contingent upon that opinion.

Act XV of 1882.

Act XV of 1882 repealed all prior enactments, and at present constitutes the Small Cause Courts of the Presidency Towns. The law administered and the local limits of the jurisdiction correspond to the High Court in its ordinary original civil jurisdiction. With numerous exceptions specified in the Act they may try all civil suits when the amount or value of the subject-matter does not exceed Rs. 2,000; the leave of the Court, however, being necessary in certain circumstances. The exceptions include, amongst others, cases concerning the revenue, acts ordered or done by the executive

* Act XXVI of 1864.

or by officers, and immoveable property. They also include various suits belonging to equity, admiralty, and divorce jurisdiction. The Courts are subject to the superintendence of the High Courts. The Act has been amended by some later Acts. 1861—1936.

Mofussil Small Cause Courts.

With regard to the Mofussil, Small Cause Courts were established* in 1860; and in 1865 the law relating to† them was consolidated and amended. Act IX of 1887 reconstituted them. Suits to the value of Rs. 500, or, if the Local Government so direct, to the value of Rs. 1,000, are, generally speaking, cognizable by those Courts. There are, however, forty-four express exceptions, which are specified in the 2nd schedule to the Act of 1887.

The constitution of the Courts, with the establishment of officers, depends upon the Local Government, the previous sanction of the Governor-General in Council being necessary. The territorial limits of each Court are defined, and may at any time be abolished by the Local Government.

Power is no longer given to reserve questions for the opinion of the High Court, and to give judgment contingent thereon. But the High Court may for its own satisfaction call for a case decided by the Small Cause Court, and pass such order as it thinks fit.

Under a variety of Indian enactments, some of these Courts have had jurisdiction conferred on them in special matters, for the details of which the students may consult Sir John Trevelyan's "The Constitution and Jurisdiction of Courts of Civil Justice in British India".

---

* Act XLII of 1860.
† Act XI of 1865.

CHAPTER XIII.

THE INFERIOR CRIMINAL COURTS AND POLICE.

Introduction—Act X of 1872—Three proposed alterations—Suggestions of the Bengal Government—Report of the Committee—Criminal liability of Europeans—The Criminal Courts established by the Code—Act X of 1882 and Act V of 1898—Distinction between the three classes of Magistrates—Magistrate of the District—Of the Subdivision—Special Magistrates—Courts of Session—Powers of Criminal Courts over Europeans—Powers of the Magistrate—Powers of the Sessions Judge—Powers of High Courts—Abrogation of differential privileges since 1923—Police Administration generally—As Modified in Bengal—In Bombay Presidency—In Madras Presidency—In the Presidency Towns—Bombay—Calcutta—Suburbs of Calcutta—Madras—North-Western Provinces—Justices of the Peace—Coroners.

Introduction. IT remains to give an account of the Criminal Courts and Police organization now existing in British India. The system for the repression of crime is the most important branch of the Government of the country, the instrument by which peace and order, which are the chief objects of Government, are daily and in all the details of life secured.

Closely connected with this Judicial and Police organization is the subject of criminal procedure. The first Code on that subject was passed in 1861. It was the product of several generations of Indian administrators and statesmen, who from the first moment that they undertook the responsibility of Government, and abandoned a blind reliance on the Mahomedan Adawluts, had undertaken the task of framing by degrees a system on which criminal justice should proceed. The system which they originally established was from time to time frequently altered,

amended, and readjusted, and at length a hundred regulations and Acts were consolidated and compressed into a single Code. **1861—1936.**

Then came various amendments of the Code itself, and, in course of time, Act VIII of 1869 consolidated these amendments.

Mr. Fitz-James Stephen* said of the Code of 1861 that it was " drawn by men thoroughly well acquainted with the system with which they were concerned; but I am inclined to doubt whether they did not know it rather too well, for they certainly threw the various provisions together with very little regard to arrangement and without any general plan". The result of the Amending Acts and of Act VIII of 1869 was, he considered, only to increase the confusion which had previously existed.

Act X of 1872.

The consequence was that the Criminal Procedure Code of 1872 was passed, which came into force on the 1st of September of that year. It repealed the Code of 1869 and so much of the Code of 1861 as had not been repealed, and various other Acts bearing upon minor points of criminal law and procedure. The later Code (viz., Act VIII of 1869) had made extensive amendments in the earlier law without repealing it, so that two Codes were in existence instead of one. The Act of 1872 entirely re-arranged the law, and also, which is the important point for our attention, reconstructed all the Criminal Courts throughout the Mofussil.

Three proposed alterations.

Three important alterations of law were proposed in reference to what I have described as the rival judicial institutions of the Crown and the Company. The object was to remove unnecessary distinctions, and

---

* Legislative Proceedings of the Council of India, Vol. XI, p. 392.

CHAPTER XIII.

establish greater uniformity of criminal jurisdiction and procedure.

The first related to the jurisdiction given by the Statute of George III* to Justices of the Peace in the Mofussil, and exercised by them on European British subjects. It was proposed† that that jurisdiction should extend to cases usually disposed of before Magistrates upon summons.

The second alteration proposed was to enable Sessions Judges to dispose of all cases against European British subjects, unless they insisted upon their right to be tried by the High Courts.

The third was with regard to trial by juries. Instead of convicting a man if found guilty by a larger majority of a jury, and trying him again if found guilty by a smaller majority, the concurrence of the Judge was proposed to be the condition of the triumph of the majority. It was proposed therefore, that, if not less than two-thirds of a jury convicted, and the Judge agreed with them, the accused was to be convicted; if there was not such a majority, or if the Judge did not agree with them, the accused would be acquitted.

Suggestions of Bengal Government.

While the Bill was pending before the Council the Government of Bengal suggested that, instead of the Justices of the Peace (who are generally Mofussil Magistrates) being limited in their penal powers over European British subjects to two months' imprisonment, as was the case under the Statute of George III, those powers should be considerably extended, and that European British subjects should be rendered amenable in a great degree to the ordinary Criminal

---

* 53 Geo. III, c. 155.

† See Legislative Proceedings (Indian Council), (1870), Vol. IX, p. 481.

Courts of the country. This suggestion was concurred in by other Local Governments, and the Select Committee appointed to consider the Bill reported— 1861—1936.

Report of the Committee.

(1) That a full power Magistrate, being a Justice of the Peace, and being, in the case of Mofussil Magistrates, a European British subject, should be empowered to try European British subjects for such offences as could be adequately punished by three months' imprisonment and a fine of Rs. 1,000.

(2) That a Sessions Judge, being a European British subject, should be empowered to pass a sentence on British subjects of one year, or fine; and that, if the European British subject pleads guilty, or accepts the Sessions Judge's jurisdiction, the Court may pass any sentence which is provided by law for the offence in question.

(3) That a European British subject, convicted by a Justice of the Peace or Magistrate, should have a right of appeal, either to the Court of Session, or High Court, at his option.

(4) That in every case in which a European is in custody, he may apply to a High Court for a writ of *habeas corpus*, and the High Court shall thereupon examine the legality of his confinement, and pass such order as it thinks fit.

This report showed the general tendency of the new legislation, and challenged discussion upon the subject of the exclusive privileges of Europeans in criminal matters. The further question relating to the extent to which uniform procedure in Presidency Town and Mofussil could be secured was left untouched.

The Criminal Courts established by the Code.

Act X of 1872 was a complete body of law upon three distinct subjects, viz., the constitution of the Criminal Courts, the conduct of criminal proceedings,

CHAPTER XIII.

and the exercise of a preventive jurisdiction for the purpose of securing the peace.

As regards the first of these subjects, the Code proceeded upon the same principle as the Bengal Sessions Judges Act of 1871. It repealed a number of Acts and regulations which, in an obscure and fragmentary manner, established Criminal Courts, and placed the constitution and powers of those Courts in a clear and distinct shape. The Chief Criminal Courts throughout the country have already been described. The Code enacted that, besides these tribunals, there should be four grades of Criminal Courts in British India, being those mentioned further on, exclusive of those of the Presidency Magistrates.

The Code was amended by several Acts (viz., XI of 1874, X of 1875, and IV of 1877), and eventually a new Code (Act X of 1882) was passed to consolidate and amend the law relating to criminal procedure. That Code applied to the whole of India, while Act X of 1872 excluded from its operation High Courts in their original criminal jurisdiction and the Courts of Police Magistrates in the Presidency Towns. The new Code repealed, wholly or partially, a number of Acts, including Act X of 1875, which regulated the criminal procedure of the High Courts, and Act IV of 1877, which regulated that of the Presidency Magistrates.

Act X of 1882 and Act V of 1898.

Act X of 1882 was subsequently replaced by Act V of 1898. The later Act, like the former, enacted that besides High Courts, and Courts established under any other law than the Code, there should be five classes of Criminal Courts in British India, viz. :—

(1) Courts of Session.
(2) Presidency Magistrates.
(3) Magistrates of the first class.

(4) Magistrates of the second class. **1861—1936.**

(5) Magistrates of the third class.

Distinction between the three classes of Magistrates.

All criminal trials in British India must be held before one or other of these Courts. The powers of a Court of Session extend to passing any sentence authorized by law; but any sentence of death passed by it is subject to confirmation by the High Court. An Assistant Sessions Judge may not exceed seven years' transportation or imprisonment. The main distinction between the other Courts is that a Presidency Magistrate and a Magistrate of the first class may sentence up to the term of two years, or impose a fine up to Rs. 1,000; a Magistrate of the second class may imprison up to six months, or impose a fine up to Rs. 200; both of them may include in the imprisonment solitary confinement, and may, if in the case of a Magistrate of the second class he is specially authorized by the Local Government, order a whipping. A Magistrate of the third class may imprison for one month, or impose a fine up to Rs. 50, but he may neither order solitary confinement, nor a whipping.

Any Magistrate may pass any lawful sentence combining any ot the sentences which he is authorized by law to pass; that is to say he may award imprisonment in default of payment of a fine, in addition to the full term of imprisonment which he is competent to award.

Besides these three classes of Magistrates, the Local Government must appoint in every district, outside the Presidency Towns, one of their number of the first class who shall be called the District Magistrate, and shall exercise throughout it all the powers of a Magistrate. It may also appoint subordinate Magistrates. In the non-regulation Provinces the Local

CHAPTER XIII.

Government may invest the District Magistrate or any Magistrate of the first class with power to try as a Magistrate all offences not punishable with death.

Magistrate of the District.

All the Magistrates of the three classes shall be appointed by the Local Government, and shall be subordinate to the Magistrate of the District, the local limits of whose jurisdiction may be prescribed by the Local Government. All Magistrates are to be independent of the Sessions Judge, except to the extent and in the manner provided by the Code.

Of the Subdivision.

The Local Government may divide districts outside the Presidency Towns into subdivisions, and place any Magistrate of the first or second class in charge of a Subdivision of a district. The Magistrate of the subdivision shall be subject to the control of the Magistrate of the District, but he in his turn shall control every Magistrate within his subdivision.

Special Magistrates.

Special Magistrates may be appointed by the Local Government in any local area outside the Presidency Towns. The Local Government may direct any two or more Magistrates to sit together as a Bench, and may invest such Bench with the powers of a Magistrate of the first, second, or third class, and direct the Bench so constituted to try such cases or such classes of cases only, and within such local limits as it thinks fit; and in the absence of such direction, the Bench shall have the powers of the highest class to which any one of its members who is present taking part in the proceedings belongs.

The Presidency Magistrates are appointed for the Presidency Towns, which for the purpose of the Code are to be deemed districts. One of such Magistrates in each town is to be Chief Magistrate.

With regard to Courts of Session, every province, excluding the Presidency Towns, shall be a sessions division (sec. 7), or shall consist of sessions divisions; and every division shall be a district or consist of districts; the Local Government being empowered to alter the number of such divisions and districts. There shall be a Court of Sessions and a Sessions Judge for every sessions division. The Local Government may appoint Additional and Assistant Sessions Judges, who shall exercise all the powers of the Court, limited, however, as regards punishment, to seven years' transportation or imprisonment.

1861—1936.

Courts of Session.

Any person (sec. 408) convicted on a trial held by an Assistant Sessions Judge, a District Magistrate, or other Magistrate of the first class, may appeal to the Court of Session. A European British subject might at his option appeal either to the High Court or the Court of Session. But this privilege has now been taken away by Act XII of 1923. Any one convicted by a Sessions Judge, or an Additional Sessions Judge, or by a Presidency Magistrate (if in this latter case he is sentenced to upwards of six months' imprisonment or Rs. 200 fine), may appeal to the High Court, except in cases where he has pleaded guilty, when there is no appeal except as to the extent or legality of the sentence. There is also an appeal to the High Court from any sentence of four years' imprisonment or transportation by an Additional Sessions Judge or by a Magistrate specially empowered. There is no appeal, however, in petty cases, that is, where the Court of Sessions or any Magistrate of the first class sentences to imprisonment not exceeding one month, or to a fine not exceeding Rs. 50, or to whipping only, nor is there any appeal from certain summary convictions.

CHAPTER XIII.

Powers of Criminal Courts over Europeans.

The provisions of the Code, unless it is otherwise distinctly expressed, apply to all persons without distinction of race; but, until the passing of Act XII of 1923, a separate chapter (c. 33) of it related to the investigation and trial of offences committed by European British subjects.* One provision in this exclusive chapter was that, in order to have any criminal jurisdiction in reference to a European British subject, the Judge of a Sessions Court must himself be of the same nationality; if an Assistant Sessions Judge he must also have held the office for at least three years and been especially empowered in that behalf by the Local Government. Another provision was that for purposes of investigation, the judicial officer must hold the double office of Magistrate of the first class, unless he is a District or Presidency Magistrate, and of Justice of the Peace, and must also be a European British subject.

Powers of the Magistrate.

Any Magistrate might entertain a complaint, and issue process to compel the appearance of the accused without regard to nationality; but if the accused was a European British subject, such process, before the enactment of Act XII of 1923, had to be returnable before a Magistrate competent to inquire into or to try the case. Such Magistrate, being a Presidency Magistrate, had power in such a case to punish up to three months' imprisonment, or up to a fine of Rs. 1,000, or both; and being a District Magistrate, power up to six months' imprisonment and Rs. 2,000 fine, or both; in cases not adequately punished by

* These include (1) all subjects of Her Majesty born, naturalized, or domiciled in the United Kingdom of Great Britain and Ireland, or in any of the European, American or Australian colonies or possessions of Her Majesty, or in the colony of New Zealand, or in the colony of the Cape of Good Hope or Natal; (2) children and grandchildren of any such persons by legitimate descent.

a sentence of that character, the Magistrate had to commit the accused to the Court of Session, unless the offence complained of was punishable with death or transportation for life, in which case the commitment lay to the High Court. In the Presidency Towns the commitment had to be to the High Court in every case, whether the accused was a European or Indian. In either Court, the accused, if a European, might claim to be tried before a mixed jury or a mixed set of assessors, not less than half being Europeans or Americans. He might also claim before a District Magistrate that his trial should be by jury. 1861—1936.

Powers of the Sessions Judge.

Before the Amending Act XII of 1923, Sessions Judges, or Additional Sessions Judges, and, when specially empowered by the Local Government, Assistant Session Judges, who had held that rank for not less than three years, might pass on European British subjects any sentence warranted by law not exceeding one year's imprisonment, or fine, or both.

If, at any stage of the proceeding, the Sessions Judge was of opinion that such sentence would be inadequate, he had to record his opinion to that effect, and transfer the case to the High Court.

Powers of High Courts.

Before the Amending Act of 1923, a European British subject convicted by a Magistrate, or Assistant Sessions Judge, might, at his option, appeal to the Court of Session or to the High Court; convicted by a Court of Session he might appeal to the High Court. The High Court was vested with power to order any European who complained of unlawful detention within its jurisdiction to be brought before it to abide its further order (s. 456).

The Magistrate was also bound to ask any accused person, unless he had reason to believe that he was

CHAPTER XIII.

not a European British subject, whether he was one or not; and if the accused did not claim before the Magistrate who tried or committed him to be dealt with as a European British subject, he would be taken to have waived his privilege.

Abrogation of differential privileges since 1923.

The above provisions for differential treatment of European accused persons were in several respects removed and in others revised by Act XII of 1923, so as to place European and Indian accused persons on a footing of equality. The European British subjects' right to be tried by European Judges and Magistrates has been entirely abrogated. Sessions Courts can now pass sentences on them of death, penal servitude, imprisonment and fine. Magistrates too can now pass sentences upon them up to the normal limits of their powers with the single saving that they cannot pass a sentence of whipping. The options previously reserved to them to choose between one of two grades of Courts has been taken away. The Amendment of sec. 491 of the Code has now given the High Court power to cause any person within its jurisdiction, under unlawful detention, irrespective of his race or nationality, to be dealt with according to law. In other respects the positions of a European and an Indian accused have been equalised by in effect allowing an Indian to claim an all-Indian jury or a jury with an Indian majority, in like circumstances in which a European may claim an all-European jury or a jury with a European majority.

Police administration generally.

With regard to the Police Administration in India, Act V of 1861, modified by Act III of 1888, and later on by Act VIII of 1895, remains as the basis upon which the general law on that subject outside the Presidency Towns rests, modified in different localities by special Acts; which it is outside the scope of this

work to discuss with any minuteness. It has been applied generally throughout the country. 1861—1936.

In Bengal an Act was passed in 1867 which abolished municipal chowkidars and provided (see, however, the Municipalities Act V of 1876) that the Police in towns should be enrolled under the general Act, the expenses to be provided by the town for which they were appointed. Act VII of 1869 provided for the establishment of general Police Districts, each subject to an Inspector-General; while a system of village chowkidars was established by Act VI of 1870. As modified in Bengal.

In the Presidency of Bombay, excluding the town, a local Act was passed called the Bombay District Police Act, 1867. This was, however, repealed almost entirely by Bombay Act IV of 1890, which provides that the superintendence of the Police throughout the Bombay Presidency shall vest in the Governor, and that its administration shall vest in an Inspector-General and his deputies; and in each district in a District Superintendent, subject to the control and direction of the Magistrate of the District. The duties and powers of the Police are provided for in the Act, viz., Bombay Act IV of 1890, amended by Act IV of 1902. In exercising his authority the Magistrate of the District must be governed by the rules and orders of his Government. He may in case of pressing need call upon the Inspector-General to furnish him with additional police; and the District Superintendents are bound to furnish him with reports on any matters connected with crimes and the maintenance of order, and even to remove their subordinates on his requisition. The Commissioner in turn has certain powers within his division which are paramount to those of the Magistrate of the District. In Bombay Presidency.

CHAPTER XIII.

In Madras Presidency.

The Regulation of Police within the Madras territories is provided for by Act XXIV of 1859, which was amended by a local Act, V of 1865. The superintendence of the Police was vested in the Governor in Council, with power to give exclusive authority to others to appoint, supersede, or control any police functionary. An Inspector-General of Police with such subordinates as the Government may think fit are responsible for the administration of the force. Special Police officers may be appointed in case of tumult or riot by the nearest Magistrate. The duties of Police officers are, to use their best endeavours and ability to prevent all crimes, offences, and public nuisances; to preserve the peace, to apprehend disorderly and suspicious characters, to detect and bring offenders to justice, to collect and communicate intelligence respecting the public peace, and promptly to obey and execute all orders and warrants lawfully issued to them.

In the Presidency Towns.

With regard to the three Presidency Towns, the Police administration was provided for by Acts XIII of 1856 and XLVIII of 1860, and those Acts, subject to frequent amendments, remained in force as far as the town of Bombay was concerned, until they were finally repealed by Bombay Act IV of 1902, which consolidates the law relating to the police in that city.

Bombay.

Calcutta.

But in Calcutta, Act IV of 1866 of the Bengal Council has repealed them so far as they relate to the town of Calcutta, and has provided that the administration of the Police in that town should be vested in an officer styled the Commissioner of Police and appointed by the Local Government which can also appoint one or more deputies to perform any of the Commissioner's duties under his orders. A special Police Force is provided for the town of Calcutta. The Commissioner

appoints them and may fine, suspend or dismiss them, he may appoint special constables, on emergency, with the powers of ordinary officers of Police. 1861—1936.

Calcutta is divided into Police Districts and the existing Magistrates of Police are appointed under this Act. The powers of the Magistrates, the Commissioner, and the Police are carefully defined under the Act.

Suburbs of Calcutta.

Ten days before this Act was passed another Act, viz., II of 1866 (Bengal Council), received the assent of the Governor-General. It enabled the Local Government to exclude the suburbs of the town of Calcutta from the general Police District of the Provinces, and to order the constitution of a Police Force therein to be under the exclusive direction and control of the Commissioner of Police for the town of Calcutta. No special Magistrate of Police is appointed for the suburbs, but the powers of the Commissioner therein are similar to those which he exercises in Calcutta. The municipal police continues to be regulated by local enactments.

Madras.

With regard to the town of Madras, the Police Acts XIII of 1856 and XLVIII of 1860 were repealed by the local Act VIII of 1867, which in turn was repealed by Madras Act III of 1888. The town Police was by the last Act constituted in such manner as the Governor in Council should direct. A Commissioner of Police was appointed for Madras, subject to the authority of the Governor in Council.

North-Western Provinces.

In 1869 an Act* was passed by the Governor-General in Council to provide for the maintenance of the rural Police in the North-Western Provinces and to

* Act III of 1869.

CHAPTER XIII.

define the law relating to village watchmen. Subsequently Act XVI of 1873 repealed this Act, and provided for a village and road Police, omitting village watchmen. The village Police are to be appointed by the zemindars, the road Police by the Magistrate of the district. Their duties are prescribed by the Act. The Magistrate of the District may dismiss the members of either force. The Local Government may frame rules for their numbers, location, and discipline, and generally for the purposes of the Act.

Justices of the Peace.

In 1869 the law relating to the appointment of Justices of the Peace was consolidated and amended by Act II of that year passed by the Governor-General of India in Council. The new Code of Criminal Procedure (V of 1898), secs. 22 to 25, now contains the law on the subject. It is provided that outside the Presidency Towns the Governor-General of India in Council and every Local Government within its provinces may appoint such European British subjects as they may think fit to be Justices of the Peace within such territories as may be notified. For the three Presidency towns the appointment of Justices of the Peace rests generally with the Local Government. For those towns any persons resident within British India, and not being the subjects of any foreign State, who may be deemed qualified, are eligible. Outside the Presidency Towns existing Justices of the Peace are deemed to be appointed for the whole of India except the towns under the Act.

A Justice of the Peace may be suspended or dismissed by the Government which appointed him.

Coroners.

The law relating to Coroners in the Presidency Towns was consolidated by Act IV of 1871. Every Coroner is appointed and may be suspended or removed

by the Local Government. He must inquire into the cause of death whenever any person has died by accident, homicide, suicide, in prison, or suddenly by means unknown. On receiving notice of such death he must summon a jury, view and examine the body, summon witnesses, and finally draw up the inquisition according to the finding of the jury or the opinion of the majority. It is no longer the duty of the Coroner to inquire whether any person dying by his own act was or was not *felo de se*, to inquire of treasure trove or wrecks, to seize any fugitive's goods, to execute process, or to exercise any Coroner's jurisdiction not especially conferred by this Act. The Act was subsequently amended by Act X of 1881, and finally by the Criminal Procedure Codes (X of 1882, and V of 1898), and the Coroners Amendment Act IV of 1908. Act V of 1889 however abolished the office for Madras and made other provision for the discharge of its duties. **1861—1936.**

INDEX.

PAGE